

No. 10954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellant,

vs.

ROBERT CUMMINGS,

Appellee.

VOLUME II.

(Pages 273 to 712, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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[Title of District Court and Cause.]

Hon. Harry A. Hollzer, Judge Presiding

REPORTER'S TRANSCRIPT

Of Hearing on Order to Show Cause Why Injunction
Pendente Lite Should Not Issue and Hearing on
Motion for Summary Judgment.

Appearances:

Joseph J. Cummins, Esq., and
Roth & Brannen, by
Lester Roth, Esq.,
For Plaintiff.

Loeb & Loeb, by
Norman Newmark, Esq.,
For Defendant.

Los Angeles, California, Friday, November 5, 1943;
10 A. M.

The Court: The clerk has called my attention to the fact that counsel are suggesting that a reporter would not be necessary. I wonder if we might review the situation and determine, after further reflection, whether we should have a reporter. To some extent I have been studying these files and would like to, at least in discussion with counsel, clarify my own thinking. For that reason it may be both helpful and necessary that a reporter take down any stipulations that may be made, or counsel might like the benefit, at least, of some views which I might express.

Mr. Roth: We are both agreeable to having a reporter. As a matter of fact, Mr. Newmark suggested to the reporter that he didn't feel, as far as we were concerned, that we needed one, but the court might feel a reporter was desirable.

Mr. Newmark: That is quite satisfactory.

Mr. Roth: I think we are both agreeable to having a reporter.

The Court: Very well. Of course, I haven't examined the affidavits that have just been filed, but from such reading as I have been able to do with reference to the record I have gathered certain impressions which I would like to speak of at this time, and it may be that counsel would like to comment thereon.

At present we have a complaint comprising several counts, [2*] and with reference to Count I plaintiff is seeking, in effect, declaratory relief and has moved for summary judgment as to that count. The defendant has applied for an injunction *pendente lite*, and various affidavits have been submitted pro and con, respecting both the motion for summary judgment and also the application for an injunction *pendente lite*. The basis for the action would seem to be that the plaintiff contends, by virtue of the facts brought out in the complaint and the answer, and also somewhat amplified by the affidavits, that along sometime in May of this year he became entitled to compensation under the contract that had been entered into between the parties sometime in 1938; that even assuming that the defendant was entitled to the relief from paying him any compensation during the period required for the making of a certain picture, in the playing of which the

*Page number appearing at top of Reporter's Transcript.

plaintiff had refused to participate, and even assuming that the defendant was entitled to declare the contract suspended for the period referred to, that from and after the determination of such period the plaintiff was entitled to his compensation as stipulated in the contract; that the defendant having taken the position that he was not entitled to be paid for this subsequent period, and having refused to pay any compensation for this later period, the defendant has breached the contract and, therefore, the plaintiff is entitled to the benefit of the termination thereof, notice of which he has given. [3]

Perhaps I should pause there and ask plaintiff's counsel whether, up to this point, I have correctly appraised your position?

Mr. Roth: I will say that your Honor has stated it very admirably and in a refreshing way.

The Court: Now, the defense here asserts, firstly, that no demand was made on behalf of plaintiff for compensation through the appropriate channel, but further—and this would seem to be the crux of the defense—that the terms of the contract entitle the defendant to continue the suspension beyond the period previously mentioned and to continue that suspension at least until the plaintiff shall affirmatively in some manner inform it that he is prepared to resume work under the contract.

Up to this point have I correctly appraised the position of the defense?

Mr. Newmark: Yes, your Honor. There may be additional defenses in so far as the claim of breach of contract is concerned. In other words, these are our basic points that your Honor has stated, but even if it were to be held that these points were not well taken, we would still maintain that there has been no material breach of

contract or that the plaintiff is in no position to make that assertion. In other words, even if it should be assumed that these points were not well taken, it would not follow that there had been a breach of the character which would entitle the plaintiff [4] to terminate the contract. But that is an alternative argument, and your Honor has stated correctly our main point.

The Court: Turning now to what may be characterized as the basic element in the defense, and in order to clarify at least my own thinking, I should like—

Mr. Roth: May I interrupt the court for a moment?

The Court: Yes.

Mr. Roth: We have prepared typewritten copies of the contract which is Exhibit A to the complaint, because I found it very difficult reading the printed copies myself, and I thought perhaps the court might want to use a typewritten copy rather than the printed copy. We have one for counsel for the defense, too. And if the court desires it—

The Court: Very well. I will avail myself of that. Now, there are some questions that I would like to have considered, and preliminary thereto I should like to quote certain passages of the contract. I call attention first to paragraph 2, and I shall skip certain passages therein, for the purpose of emphasizing the particular language that gives rise to such questions, at least in my own mind.

“The artist agrees that throughout the term hereof he will render the services hereinafter specified, solely and exclusively for and as requested by the producer; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate;” [5]

Now, I am skipping several lines down in the same paragraph 2. Resuming the quotation:

“The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer.”

That is the end of the excerpt quoted from paragraph 2. Turning now to paragraph 18:

“The services of the artist hereunder are to be rendered at such place or places as may from time to time be designated by the producer.”

That is the end of the quotation in that paragraph.

Turning now to paragraph 19:

“The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer’s studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews,” etcetera.

Let us turn now to the complaint. [6]

I, of course, is the proforma recital of the defendant’s corporate existence.

Paragraph II includes the following, as the next to the last sentence:

"The present controversy arises by reason of the fact that defendant contends that said contract still exists between the parties and plaintiff contends that it was terminated on May 29, 1943."

I notice that the answer purports to deny that, and I am wondering if that was really intended to be denied.

Mr. Loeb: Well, I didn't prepare the answer, your Honor. I don't know what was in Mr. Schwartz's mind at that time, unless possibly the purpose of the denial was to probably give point to our contention that no real substantial controversy does actually exist in this case; that there is no real bona fide controversy as to this. That is the only thing I have in mind. I wouldn't like to say for the record now, your Honor, something at variance with what is contained in the answer, because Mr. Schwartz may have something in mind that hasn't appeared to me. It is perfectly apparent that the first cause of action is predicated upon the assumption that there is a controversy set forth there. I am afraid that is as far as I can go.

The Court: You say there is no such dispute between the parties, the plaintiff, on the one hand, contending that the contract was terminated by him on May 29th, and the defendant [7] contends that it wasn't terminated, but still is in existence?

Mr. Newmark: No; I don't say that, your Honor; obviously there is a dispute, as evidenced by the various letters and communications that have passed. I didn't make myself clear. The only thing I can ascribe to the drafter of this answer, in denying that particular portion

of paragraph II, would be that possibly he had in mind that by admitting that a controversy existed he would be admitting that there was a bona fide controversy; that is, by "bona fide controversy" I mean that facts exist which give real color to the plaintiff's claim. And it may be that that is what he had in mind. I don't know, frankly, your Honor. My own view is that we certainly ought to have this matter determined. I myself see no harm in admitting that there is a controversy as alleged in there, and it doesn't seem to me that the admission of that fact would in any way admit that the plaintiff has any real ground for raising that point.

The Court: I think there is a distinction there.

Mr. Newmark: I do, too; and so long as that is plain I would have no objection to agreeing that it could be considered, for the purpose of this hearing, certainly, that there is a controversy there, without in any way thereby admitting that the plaintiff's contention is either well taken or is colorfully well taken.

The Court: I think it is satisfactory to say that an issue is raised with reference to what is recited in the [8] concluding sentence of paragraph II, namely, "Said controversy arises out of the facts hereinafter alleged." Of course, the defendant contends that the facts are different. So obviously there is place for a denial there, but it seems to me the balance of paragraph II is really not in dispute.

Paragraph III apparently is not in controversy, and paragraph IV apparently is not in controversy.

Mr. Newmark: I think there is just the difference of the date, your Honor; May 18th and May 19th.

Mr. Roth: That is all.

Mr. Newmark: That is all. I don't think there is any materiality as to that, though.

The Court: Are you agreed that the role of "Hank" in the picture entitled "Fired Wife" was completed May 19th, rather than May 18th?

Mr. Roth: Yes. They say the 19th. We say the 18th. It doesn't make any difference. We accept the 19th.

The Court: As to paragraph V, apparently it is admitted that the defendant served on plaintiff the notice which is set out in *haec verba* there. The only issue apparently that has been raised is as to the plaintiff's interpretation of the meaning or effect of that notice.

Mr. Newmark: I think that is correct.

The Court: Turning to paragraph VI, the last sentence reads:

"No demand, oral or written, was made by defendant at any [9] time after April 10, 1943, that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract."

The answer denies that allegation. Such study as I have been able to make of the affidavits prompts this question: It appears that the practice followed by the parties; in other words, the construction by the parties themselves given to the contract was at least in part as follows: From time to time the defendant produced pictures, in certain of which it required the plaintiff to portray a particular role. So far as is disclosed by the record the plaintiff was not accustomed to sitting around the studio day after day, but merely attending at the studio, or wherever the picture happened to be produced, on such days as the producer or those working under him required his presence, and the plaintiff received compensation during periods when he wasn't actually engaged in

portraying a role or when he wasn't actually present on the studio lot or on location. Sometime in March of this year the defendant apprised plaintiff that a picture entitled "Fired Wife" was about to be produced and that he would be expected to portray the particular role therein. I am not sure whether the record makes it clear, but we may assume, I think, for the purpose of the present discussion, that the plaintiff was properly notified to report at the studio to begin portraying the role of "Hank" in that picture; that he failed to do so; that the defendant [10] went ahead with the production, substituting another artist in his place. I am a little bit ahead, and I shall go back to April 15, 1943, on which date the defendant served a notice upon plaintiff advising him, in substance, that by reason of his refusal to report on April 12, 1943, the studio had elected to exercise certain rights granted to it under paragraph 12 of the contract, and in this notice they stated, among other matters, and I am reading now the last sentence of the next to the last paragraph which is found in the complaint, page 3, beginning with the last three words of line 11:

"We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person."

I call particular attention to the expression, "refuse to pay you any compensation until the completion of such role by such other person."

Returning now to paragraph V and the notice dated May 18, 1943, which on that day was served by defendant on plaintiff: that was the notice which called attention

to the fact that the defendant had suspended the plaintiff by reason of his refusal to portray this role in the picture "Fired Wife," and it further advised plaintiff that the defendant had elected to extend the term of his unemployment for the period [11] of the suspension, and added this language, which is set forth in the next to the last paragraph of that notice:

"Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period."

Now, I am suggesting at this place that plaintiff's counsel keep in mind that it is not clear to me just what is the theory of the defense with reference to that particular portion of the notice and what legal effect the contention there asserted has upon the rights of the parties.

Now, have I already averred to the concluding sentence of paragraph VI of the complaint?

Mr. Roth: Yes, your Honor. You stated, in respect to that concluding sentence, that that was denied by the answer.

The Court: Yes.

Mr. Roth: In that respect might I call your attention, although I am certain that it hasn't been overlooked, to paragraph X, page 9 of the complaint. By paragraph X, which is in effect an admission, it actually has the effect of admitting the concluding sentence of paragraph VI.

The Court: I have a notation here that paragraph X has not been denied.

Mr. Roth: Yes. [12]

The Court: And I was about to observe that it is a matter with reference to which I would like to have the defense comment, because it is not clear to me as to the basis upon which the defendant contends that there was any further refusal or failure on the part of the plaintiff to do that which, under the contract, he was required to do.

At the outset of this discussion I quoted from certain passages of the contract which, I confess, represents only a limited study, but which, in my present thinking, would seem to indicate that if the defendant desired plaintiff to portray some new role or to do any of the other matters specified in the portions of the complaint previously quoted, that the practice of the parties was such that the plaintiff was entitled to await some new or further call on the part of his employer.

Turning now to paragraph VII, the first sentence is apparently denied; also, that portion of the concluding sentence wherein the plaintiff has undertaken to, perhaps, state a legal conclusion in characterizing the defendant's failure to pay any further compensation—

Mr. Newmark: May I interrupt a moment, your Honor?

The Court: Yes.

Mr. Newmark: I found an error in the answer here to which I called counsel's attention before appearing and said I would like to amend at this time. On page 3, line 2—

The Court: Of the answer? [13]

Mr. Newmark: Of the answer, where it repeats the words of the complaint, "failed and refused to pay," and in line 3, "has failed and refused." The words "and refused" should not have been included in either case, and we ask now that that be stricken, as an amendment.

Mr. Roth: Mr. Newmark advised me of that just prior to the hearing this morning, and I told him I was not going to oppose the request for any amendment that is apparently based, as it is, upon an inadvertence of the drafter. That is my position now.

The Court: Very well. The clerk may note such amendments. In other words, you are striking out the words "and refused" in line 2 and again in line 3?

Mr. Newmark: Yes, sir.

The Court: On page 3 of the answer?

Mr. Newmark: Yes, your Honor.

The Court: At this stage perhaps counsel can help clear up this matter of what practice was followed by the parties with reference to the physical steps of picking up a check representing compensation, where it was obtained, the manner in which that feature of the performance of the contract was actually carried out. Now, I gather from the affidavits that defendant had an office where its employees, or at least the artists, such as this plaintiff, would go on stated occasions or could send someone to obtain the check which represented the compensation paid to him under the contract, [14] and that the practice was a rather simple one; he didn't have to wait on the president or the chief executive of the company, but obviously in large business enterprises, as undoubtedly this defendant's business is, that there is orderly and systematic procedure followed and that one would come to some office or counter where he would ask for his check and it would be handed to him, perhaps by some subordinate holding no particular title in the accounting office, the cashier's office, or some such department; those checks would be made out in advance of the time when the employees normally would be paid; that those in charge of the defendant's

financial records would follow a particular routine and the checks, perhaps hundreds of them, would be signed and be there awaiting the arrival of the employees.

Now, are we to understand that the affidavits indicate anything different as to the practice which was followed?

Mr. Newmark: No. I think that is substantially correct, your Honor, except this: That the practice which would be followed in the case of a man who is regularly working for the studio, namely, of having the checks ready where his agent picks them up, is not at all the practice or the procedure which we would expect to have followed or as to which there may be any precedent where a man is on suspension and has been notified that the suspension is going to continue until he comes back to work. In other words, your Honor has outlined the practice, and when I state that that is [15] substantially the way I understand it, I do not wish to be understood to say that that is the practice that is followed where a man is suspended and he is not going to be paid until he comes back to work. We certainly do not concede in this situation that there is any practice, where they send a person or an agent for the man's check and say, "Is the check ready?" And they say, "No; the man is on suspension," then take the position that the plaintiff is ready, willing and able to go back to work. In other words, I don't profess to know what the practice would be in a case of that kind, or whether there have been any other cases that have arisen in this way: I don't know; but I should suppose that—and this probably is a matter that isn't to be considered on the record—but I should suppose that the matter of suspension of an artist of some importance is not something that just occurs in five minutes. It is probably preceded and succeeded by various talks

with the artist, with the agent, and so on and so forth. And I should also assume, although here again I am not purporting to state facts, because I don't know what the facts are, but I have a little familiarity with the way the industry works—I should also assume that where an artist has been suspended and has been notified that he is not going to be put back on the payroll until he is ready to come back to work, that there would be, in the normal course of events, some contract between the officials of the company on the one hand, and the artist or [16] his representative on the other, relative to a change in that situation. And I don't think that the practice of picking up checks, where there is a continuity of employment, has any bearing on the particular factual situation we have here.

Mr. Roth: May I correct Mr. Newmark in one statement he has made and repeated, and which I think he is assuming is a fact in this case? That is the statement that that would not be the practice where a man has been notified that he wouldn't be paid until he reported back to work. I have studied the notices assiduously, not only the two notices that we plead in *haec verba* in our complaint, to-wit, April 15th and May 18th, but also those notices which are made a part of the affidavit of Robert Cummings and which include all communications which took place between the parties from May 29th to and including the date that the complaint was filed; and in only one of them, the notice of June 2nd, which is set forth in *haec verba* in the complaint, is there any statement by the defendant that the plaintiff wouldn't be paid until he came back to work. In the notice of June 2nd, which is in the complaint, there is a statement, "If you are willing to report back to work," or words to that effect, "you can do

so''; but in no other notice is there such a statement. And, of course, that notice of June 2nd was not sent until after the notice sent by the plaintiff on May 29th, which terminated the contract; and there is nothing in the [17] notice of April 15th and there is nothing in the notice of May 18th which says he is going to be on suspension until he comes back to work.

One other thing: We don't have the affidavit here, but it can be procured very easily. Robert Cummings had been on suspension before. Other actors and actresses of Universal have been on suspension before; one that has been reported to me and that I know of, Deanna Durbin. Her suspension was for a definite period of time, as is the case here; and in each case the actor or actress automatically was put back on the payroll upon the termination of the period of suspension specified in the notice. That is all I care to add to what has been said.

Mr. Newmark: I think that the difference between us as to that, Mr. Roth, is a matter of interpretation of these documents.

Mr. Roth: That may be true, Mr. Newmark, but I claim this, and I think with some foundation, because the interpretation has been placed upon them by the defendant itself in its notices. The defendant elected to send these notices. It sent the notice of April 15th, it sent the notice of May 18th, and the defendant sent the notice of June 2nd, as well as subsequent notices. In just one of them did it elect to make its position clear that it wouldn't pay until the artist reported back, and that one is the notice of June 2nd.

Mr. Newmark: I will be glad to reply to that, your Honor, [18] but I think we are getting into the matter—

The Court: I have brought up this matter merely to

indicate that the record, as I see it, is not clear as to what is the position of the defense with reference to the basis for its position that some affirmative action was required on the part of the plaintiff before he would be entitled to the resumption of compensation.

Mr. Newmark: I will be glad to reply to that, your Honor. I would say, first, that in so far as the motion for summary judgment is concerned there is, of course, the definite issue as to whether any demand was ever made on the defendant, either through this pay window or otherwise. The affidavits make a clear issue of fact on that subject. The plaintiff's affidavits say that the demand was made, and the defendant's affidavits say no such demand was made. So as far as the position of the defendant, under the affidavits and the pleading, is concerned, it stands that they are denied and that the defendant at all times understood that the plaintiff was not going to work. But passing that for a moment and going to the contract. Paragraph 12 of the contract gives the studio the right—I had better refer to the type-written part, if your Honor is referring to that.

Mr. Roth: Paragraph 12 commences on page 9, Mr. Newmark.

Mr. Newmark: Yes. Page 9, line 20: "In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit [19] of his ability or as instructed,"—and, of course, the pleadings show that he refused to carry out the particular role—"the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of

this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues."

That is one right. Then continuing: "If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been directed to render any other of his required services hereunder, then and in either of said events the producer shall have the right to refuse to pay the artist any compensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof."

Now, a little later down, in line 29, page 10: "[20] period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder."

Referring for a moment to the notice which is set out in the complaint. The first paragraph, as I read this notice—

The Court: Which notice are you speaking of?

Mr. Newmark: Page 2, paragraph III of the complaint, the notice of April 15.

"This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your

contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943, in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect."

That was the failure and refusal to comply with the obligations under the contract of his employment, which included, as one of the obligations, that he fulfill a particular role, but it also included an obligation to report for work. And the notice went on to say: [21]

"We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person."

It seems to me by reading this notice, which is the first notice, together with the contract; it is very clear the studio had the right to put the plaintiff on suspension until the end of his failure, refusal or neglect to perform his obligations; but they had another right, too—

The Court: Before you leave that first right, are you now speaking of the right to suspend him for the period required to portray the role of "Hank"?

Mr. Newmark: No, your Honor, I am not.

The Court: What was the period?

Mr. Newmark: During the period of his failure, refusal or neglect, whatever that may be.

The Court: What was the neglect?

Mr. Newmark: The neglect, if your Honor please, was to comply with the provisions of the contract.

The Court: In what respect?

Mr. Newmark: Let us go again to paragraphs 2, 18 and 19. Paragraph 2: That he will render the services hereinafter specified; that he will render his services as an actor in such roles as the producer may designate; also, in paragraph 2, that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and [22] regulations. And in paragraphs 18 and 19, which your Honor read, that he will render his services at such places, and so on, as may be designated; and in paragraph 19, that he will report at the studio, and so forth.

Now, he said, "I am not going to play this role." That was a breach of his contract. They were, under this contract, granted the right primarily to put the artist on suspension until the termination of his—until he, so to speak, wipes the slate clean of his breach of contract. Whether that would last two days or whether that would last two years wouldn't depend upon the time that it took to complete the role. In other words, he might come back, if your Honor please, in three days and say, "I have changed my mind. I am going to do this role, after all, and I want to go back to work." And that is precisely, as I understand, the purpose of the supplementary paragraph in paragraph 12. That says, in effect, that it doesn't make any difference whether the artist changes his mind and doesn't make any difference whether the failure, refusal and neglect endures during the time required for the substitute to play the role. In any event, the shortest period of time that the artist could be put on suspension is the time required for the substitute to complete the role;

but that, if the court please, is the shortest time; not the longest time. In other words, it prevents the artist from coming to the studio in the middle of the production and saying, "I am ready to go [23] back to work. Put me back on salary."

The Court: That much is clear, but what is bothering me and which is not clear: Assuming that I have correctly outlined the practice followed in the construction of this contract; namely, that the artist does not sit around the studio after the manner of a farmer who sits in the country grocery store, to use a slang phrase, "chewing the fat," waiting for some producer or director to tell him that there is a particular picture and a particular role to be portrayed; but that the practice which represented the construction which these parties gave to the contract was that whenever it suited the employer to produce a play in which it desired the services, it would apprise him of that fact and would specify the role and it would indicate when the production would begin or when discussions or conferences would take place. Now, if I have correctly stated the interpretation which the parties themselves gave to the contract, then assumong that the plaintiff breached the contract by his failing and refusing to portray this role of "Hank," how would he know, until he received a call from his employer in conformity with this practice, that there was some other production, some other role in which his services were desired? because he wasn't to perform services of a bookkeeper. His services are defined in the contract. How was he to know, under this contract and the construction which the parties themselves gave to it, when his services were [24] further needed unless he heard from the employer?

Mr. Newmark: Well, if your Honor please, I don't think he would know when his services were needed, so far as acting in productions or reporting for tests or stills are concerned, but that is not the event which gives him his right to compensation. In other words, as your Honor pointed out, he is entitled to compensation even though in a particular week or series of weeks he may not be near the studio. So that the fact that he will not know until he is notified that there is a production isn't the event which gives rise to his right to pay.

On the other side of the picture, if I may answer the court's query by another question: Here is a man who has committed a material breach of a contract, which, under the contract, would have given the studio the right to cancel him out entirely, to discharge him. For some reason in the motion picture business the studios always seem to want to hang onto their stars, but that is neither here nor there. The studio has no way of knowing, certainly, whether this contumacious attitude, or whatever his attitude was, is going to continue or not. Certainly where a man refuses to play a role in a picture there is reason to believe, in the normal course of human events, that there is going to be trouble with this particular man. That is something that is perfectly plain. In other words, there has been some kind of an argument between the artist on the one hand and [25] the studio on the other, which has resulted in the refusal of this man to play a role. Now, the question is, what is the future going to bring? The studio sends him notice, "We are going to put you on suspension during your present failure, refusal or neglect to perform your obligations under your contract."

The Court: What other obligations was he called upon to perform which he refused to discharge?

Mr. Newmark: Well, so far as the particular case giving rise to this is concerned, it was simply the refusal to play this role; but obviously if a studio sets up a given production for a certain time and for a particular artist, then he refuses to play that role, it has to make other arrangements. So that for practical purposes they can't call upon him for the next few weeks or next few months to do other services around the studio. But the important thing, as I see it, is his failure to comply with his obligations under the contract, and whether those obligations relate to the playing of a particular role or whether they relate to any other obligation under the contract does not affect the length of time during which he is to be put on suspension, because in either event the length of time is the continuance of his refusal and neglect to perform.

The Court: And what I am trying to find out is, to perform what?

Mr. Newmark: To perform whatever obligations he has [26] under the contract.

The Court: Again it isn't clear to me which of the obligations, which under this contract he promised to perform, does the record disclose he failed to discharge.

Mr. Newmark: Well, I think, your Honor, that the particular cause for suspension was his failure to portray this particular role, then he was put on suspension. In other words, his particular refusal was to portray a particular role. But what I am trying to suggest to the court is that that is simply the essence in which he refused to perform his contract; and the question which I was about to suggest to your Honor was, once there has been a breach by an artist, even though it relates to something

which, in the normal course of events, could be cured—or let's take this situation. I think I can answer what is in the court's mind. Suppose under the contract the artist was obliged to appear on a radio show at a particular time upon request of the studio, and he refused to do it. He said, "I don't want to do it," and he does not appear. The studio under this contract, I take it, could suspend him, even though the suspension notice might go out after the date when he was supposed to have gone on the radio. Then it would be up to the plaintiff, or to the defendant, as the case may be—I mean the artist—to say, "Well, I have repented. I am ready to go back to work. Please lift my suspension." In other words, the actual time it takes to do the act for which [27] the suspension is made does not determine the length of the suspension.

Mr. Roth: May I ask Mr. Newmark a question, with the court's permission?

Mr. Newmark: Certainly.

Mr. Roth: Assuming the situation just illustrated to the court, and the company has simply given the artist notice that he is suspended by reason of his failure and neglect to perform certain of his covenants and will remain on suspension; the artist then comes back to the company with his hat in his hand and tears in his eyes and says, "Please take me back." Would the company have to do it?

Mr. Newmark: I would assume, without checking this over very carefully, that if the company has not elected to terminate the contract, but instead said, "We are just going to put you on suspension," I assume they would have to take him back.

Mr. Roth: What becomes, then, of the language you read to the court on page 10, commencing with line 29, which provides as follows: "Any period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder."

In other words, if the company elects the first method of [28] suspension and says, "Until they are ready to call him back," which first method of suspension must be read with the clause which I have just read, nothing the artist can do can put him back on that payroll unless the company wants to put him back.

Mr. Newmark: No. I think there are two things I would like to say. In the first place, you say, "What becomes of this clause at page 10, line 29 of the typewritten contract?" This clause provides for a way in which the period of suspension may be terminated, but it contains the words, "Unless sooner terminated."

Mr. Roth: That is right.

Mr. Newmark: In other words, this isn't an exclusive way in which the suspension can terminate. So that if, in the case you give, the artist comes around and says, "I am ready to perform," the suspension, by its terms, can only exist during the continuance of his refusal. But there was one other thing. I don't recall now whether in the case you gave this repentance occurred before the act was supposed to have taken place or after the act was supposed to have taken place—

Mr. Roth: After he was suspended he comes back to work and he says, "I would like to get back on the pay-

roll." Does that terminate it under that clause which you read to the court?

Mr. Newmark: I don't think it terminates it under this [29] clause.

Mr. Roth: Under any clause?

Mr. Newmark: I would certainly say that if the suspension is not fixed as, at least, of a certain time, or that period has gone by and the suspension is during the continuance of the failure, refusal or neglect, that when the artist comes and says, "I have repented and I am ready to go back to work," the studio can't keep him on suspension for six months or a year, the period of his refusal or neglect and time over. That certainly is my interpretation of this contract. Whether that situation ever occurred or arose in this case is entirely a different situation.

Mr. Roth: Well, I am giving you an illustration. I am not attempting to suggest what happened in this case. It did not happen in this case.

Mr. Newmark: The question I was trying to suggest, in answer to your Honor's question, "When would the artist know when the studio wanted him?" was, when did the studio know when the artist was going to come back and be a good boy, unless he told them so? In other words, is the interpretation to be urged here that where an artist has committed a material breach and the minimum period has expired, namely, when they have gotten a substitute, that irrespective of any manifestation of willingness on the part of the artist to come back to work and to be a good boy, the studio must then immediately put him on the payroll and continue paying him [30] for weeks or months, maybe, before they even get a new role for him, without having any idea whether he

is ever going to come back to work? That is the other side of the question with which we are concerned.

The Court: I have encouraged this discussion with a design; namely, I am seeking, if it be possible, to get the record of this case in such shape where you virtually have an agreed statement. I am inclined to think that there is very little about which there is room for controversy here, and while I recognize that the discussion in part has gone outside the record, I have encouraged that because I am trying to draw out both sides in the hope that we can develop the facts upon which this case should be submitted. The discussion has, I think, tended to crystallize the points wherein you differ as real points of law, rather than any serious dispute as to facts.

It occurs to me that sufficient has been developed to indicate that the motion for summary judgment should not be ruled upon at this time, but rather that counsel should be urged to determine the possibility of amplifying the facts, which could be formulated in an agreed statement. And I am inclined, also, to believe that you can pretty well indicate the extent to which you may differ about this matter of coming to collect the check. Then I am rather impressed with the thought that the right of the defendant to an injunction is involved in contentions which make it [31] rather doubtful that the defendant is entitled to at least an injunction pending the trial. It occurs to me that if, on the one hand, the plaintiff can show that he was warranted in notifying his employer of the termination of the contract, that really would put an end to not only injunctive relief, but any relief on the part of the defendant. On the other hand, unless the plaintiff's position, with respect to the termination of that contract, can be upheld, then I think it is clear the

defendant is entitled to insist that the contract is still in effect.

There would, however, remain the question to which reference was previously made, whether this contract is so worded as to give to the employer the right to hold onto plaintiff's services indefinitely or, in other words, for the balance of his life as long as he sees fit not to report at the studio. I don't recall that either side has cited any case which purported to deal with a situation of that type, but a provision which would have that consequence is one respecting which, I think, exhaustive study would need to be made. My first reaction is that it would be against public policy. I am not prepared to rule, of course, at this time, but as I gather from this discussion the defendant asks for a construction of at least one of the provisions of its contract which would have the effect of binding the plaintiff to give his services for the balance of his natural life. Perhaps I have stated that inaccurately. [32] Put it this way: An interpretation which would deny to plaintiff the right to earn a livelihood for the balance of his natural life, because of a refusal to perform his contract with the defendant.

Mr. Newmark: That is, to earn his livelihood other than working for the defendant for the balance of the term?

The Court: That is right. Now, in brief I am going to suggest that we handle the case in this fashion: That each of these motions be denied without prejudice with the view that we have an early trial on the merits, and to that end that counsel undertake to present an agreed statement, and to the extent that you are not prepared to admit factual matters that you outline what the evidence would be, because it may arise that a ruling would be

made that even in the face of certain evidence no difference would follow in the decision.

I see nothing to be gained by continuing the discussion as to the merits of either the motion for summary judgment or the application for an injunction *pendente lite* at this time.

Mr. Roth: May I suggest a slightly different solution of the matters? If it is proper I would like to say that the summary, which the court has made this morning, of the pleadings, the contract and the issues involved, demonstrate that the court has made a conscientious and thorough study of this entire matter and is thoroughly alive to what the [33] decisive point in the case is. The reason I feel that a slightly different solution would better fit the needs of the parties is this: If both motions are denied at the present time without prejudice and an early trial date is fixed, that would mean this: In the event the plaintiff in the action had an opportunity to perform on the radio, let us say next Monday night, defendant would then immediately petition the court for another order to show cause in an attempt to restrain him.

The Court: I didn't state wholly what I have in mind. I am satisfied that no injunction *pendente lite* should be issued, because of the views which I presently hold, and that more and greater injury would result by the granting of such an injunction than would arise if it were denied pending the trial. So that to express myself more accurately I should say that on the record as I presently see it we would not be warranted in granting an injunction *pendente lite*.

Mr. Roth: In order to eliminate any difficulty, because I understood from Mr. Newmark that we could

have a very early trial in this matter, which, of course, is entirely satisfactory to me, I wonder if we couldn't make this sort of an agreement pending the trial of the action, which has already been discussed between Mr. Newmark and myself somewhat: That is, that plaintiff will not enter into any contract, pending the trial of the action, to do any motion picture work, but [34] he will take advantage of any and every opportunity that he has to appear on the radio between now and the time of trial. Any moneys that he may earn by reason of such appearances we are willing to impound with the clerk of the court, or anyone else that the court may designate or that Mr. Newmark and myself may agree upon. Those moneys, assuming that the defendant in the action has any interest in those moneys by reason of its contract, which it may have but which we are not conceding, they would be, of course, subject to whatever the decision of the court was at the trial of the action. That gives the plaintiff in the action some leeway between now and the date of trial in a field of entertainment, which can't in the least impair or infringe upon any of the defendant's fundamental rights.

The Court: I gather from the affidavits that there have been times, at least, when the defendant has permitted him to do so.

Mr. Roth: Oh, yes. They concede that in their own affidavit.

Mr. Newmark: May I consult for just a moment on that, your Honor?

The Court: Yes.

Mr. Newmark: I was going to suggest, your Honor, before Judge Roth made this last suggestion, that instead

of denying the injunction *pendente lite* that the matter ought to go off calendar. In case the occasion for more vigorously [35] arguing the matter should present itself, namely, another radio appearance, because I think even apart from the matters which your Honor has suggested this morning there are additional features which would, I think, lead to the conclusion that he had no right to terminate the contract and that the contract is still in force, and before any denial, which I think would operate with prejudice as far as subsequent applications, on the same set of facts to another appearance are concerned, would be made, I have intended to ask the court to have the matter go off calendar, because it might be said to have reached that position. But it does seem to me, and for that reason I took the two or three minutes to talk to Mr. Erlick, who is from the studio, that the arrangement Judge Roth suggests, particularly if we can get an early trial, is a fair arrangement. And I gather that this is without prejudice to the rights of any of the parties. In other words, the plaintiff agrees he won't enter into a motion picture contract or do motion picture work, but he doesn't concede that he is not entitled to.

Mr. Roth: Precisely.

Mr. Newmark: And we, on the other hand, say we won't take any more of the court's time in arguing about the preliminary injunction or try to stop Mr. Cummings from going on the radio, but we don't concede he is entitled to do so. In other words, it is entirely without prejudice. And the money, as far as I am concerned, could be impounded [36] with the court clerk subject to any final judgment that is entered in the matter. That would be satisfactory to me, if it is satisfactory to the court clerk, or put it in the bank.

Mr. Roth: The latter part of your statement is entirely satisfactory to me. I don't care where the money is impounded. And, of course, the stipulation is entirely without prejudice. But I think the original suggestion of the court, that we have an early trial and that both motions be denied, ought to be what is done. We want this matter resolved on the *exparte* application for an injunction, or in lieu of denying the *exparte* application for injunction—not the *ex parte* application for injunction, but the order to show cause and the motion for summary judgment, the court might submit them both or continue them both to the time of trial, then they will be merged in the trial and will all be disposed of at the same time. Meanwhile we have this stipulation.

Mr. Newmark: We will be operating under this agreement.

The Court: That is perfectly agreeable with the court, that the further hearing on both motions will go over until the time of trial. And meanwhile the stipulation will be in effect that the plaintiff, without prejudice to either side, may proceed to take radio engagements, that all compensation derived therefrom shall be deposited with the clerk of the court awaiting the decision of the case.

Mr. Newmark: And that the plaintiff will not do or [37] enter into any motion picture work during the time.

The Court: Yes. That is also part of the stipulation; that he will not enter into any motion picture work or contract to do that kind of work, pending the decision of the case.

Now, with reference to date of trial: Do you think that, in view of your further efforts toward arriving at an agreed statement, which might, perhaps, in part incor-

porate what we have said here this morning, the case could be tried in a day?

Mr. Roth: I hope so, your Honor. I believe it could be, because if there are any questions of law which we are not agreed upon or which we can't make clear to the court at that time, it can be submitted as questions of law on briefs. I rather believe that we could take all the evidence necessary to try this case, on all the causes of action, in a day. What do you think?

Mr. Newmark: I am inclined to think it may take longer, particularly if we get into the issues of some of the other causes of action as to whether Universal tried to discipline Cummings, and so forth. It seems to me that will take a couple of days, at least, to try. In other words, if we go into the question of whether Cummings was given the right kind of roles to portray his part, or whether the studio tried to keep him down, it seems to me it would take at least two days, even with all our preparatory work being done. If I were to remain here I am sure I could work out with you a [38] great deal of the case, so we would have very little evidence to present, but I am not sure it can be boiled down so much that we can get through in a day.

Mr. Roth: Let's assume two days, then. I don't think it will be more.

The Court: Something was said about counsel going out of the state.

Mr. Newmark: Well, if your Honor please, I will not be here to try the case. I am leaving Monday. As a matter of fact, I am going overseas, so I don't know when I will be back, but I know I won't be back for this case. I will be gone, I think, for the duration of the war, at

least with Germany. And I think Judge Roth is going to be out of the state for two or three weeks.

Mr. Roth: Yes. I am leaving, your Honor, on the 9th, which is Tuesday. I don't expect to be back until about December 5th, but I could try and would be glad to try it any time after December 15th, or the early part of January, 1944.

Mr. Newmark: That would be satisfactory to our office, your Honor.

The Court: Then we will give you the first trial date in January, which would be January 4, 1944.

Mr. Roth: That will be satisfactory.

The Court: I take it that commencing December 15th you will undertake to work out this agreed statement. [39]

Mr. Roth: Oh, yes. I am learning for the first time that Mr. Newmark is going overseas, and I hear the news with regret, because I would like to work it out with him, but whoever in the office is assigned to the case I will make it my business to contact them and I think we can come into court with an agreement on practically all facts, unless we get into some of those other causes of action as to which there will be a dispute.

The Court: I had this in mind: That we endeavor to fix a certain time prior to the actual trial date when you will undertake to file this agreed statement and pre-trial memorandum of points and authorities. I think it would be desirable to have that accomplished some days prior to January 4th.

Mr. Roth: I think I could promise to have it in the hands of the court sometime before December 25th. I rather think sometime between the 20th and 23rd of December.

The Court: I notice that this year December 25th falls on a Saturday. Do you think you can get it in on December 24th?

Mr. Roth: I think so, your Honor. I am rather certain that I could be—

The Court: Should we say that the pre-trial memoranda should be filed by December 30th?

Mr. Roth: Of that I am sure. If I could have until December 30th I am certain of it. [40]

The Court: That would include your memorandum of points and authorities.

Mr. Roth: Yes.

Mr. Newmark: Your Honor, I would just like to make one statement in case I should forget to mention it. I simply want to state this: That our memorandum of points and authorities will probably include cases dealing with the question of whether failure to pay, even assuming our interpretation of the contract to be wrong as to a material breach, particularly where there is a failure under misapprehension which could be corrected by the plaintiff, that the plaintiff is estopped to make any such contention now. I want to make that statement so we will have it on the record.

Mr. Roth: That is what I anticipated.

Mr. Newmark: There may possibly be an amendment setting some of those matters up, which I have already suggested.

The Court: Very well.

Mr. Roth: The trial date is January 4, 1944?

The Court: At 10:00 a. m.

Mr. Roth: And the time set for the pre-trial memorandum is December 30th of this year?

The Court: Yes.

[Endorsed]: Filed Dec. 15, 1944. [41]

REPORTER'S TRANSCRIPT

of Testimony and Proceedings on Trial.

Los Angeles, California, Tuesday, January 4, 1944;
10 A. M.

The Clerk: Robert Cummings v. Universal Pictures Company, Inc.

Mr. Cooper: Ready for the defendant.

Mr. Roth: Ready.

The Court: The pre-trial points and authorities are quite comprehensive and illuminating. However, I haven't had an opportunity of making an exhaustive study thereof, but I think as the evidence develops that we shall be able to profit by the points that have been advanced.

I believe that in the memorandum opinion that was filed a few days ago I indicated the view that I thought should be taken with reference to the amendments, or second amendment to the answer. I see nothing to be gained by re-examining that aspect of the case at this time. In other words, my present thought is, as indicated in that memorandum of decision, that unless the evidence would support the legal theory that I have indicated would justify such a defense as is outlined in the second amendment to the answer, that I question its validity. However, the evidence may develop some matters that are not presently clear.

I should like to call the attention of counsel to the second count. The amount involved is less than \$3,000, and I question jurisdiction of that count. It appears to be an ordinary action on contract, and unless something further [2] develops I think we should have that ruling, that there is lack of jurisdiction on that particular count.

Then with reference to count one, I should like to leave this suggestion: It would appear that, taking into consideration the admissions contained in the pleadings and the facts conceded in the formal stipulation of facts, that upon proving the allegations set forth in the last sentence of paragraph 6 and the allegations contained in the first sentence of paragraph 7 of the first count, that if the case rested there, that the plaintiff would be entitled to judgment on the first count.

Mr. Cooper: Will your Honor repeat that? I didn't have my complaint before me.

The Court: Yes. I will ask the reporter to read it.

(Statement of the court read by the reporter.)

The Court: I am indicating what I would like to characterize as tentative views, and thereby afford to counsel an opportunity to direct the proof or the argument accordingly. I have already indicated the view presently held with reference to count two, and, of course, count three is the same.

With reference to the last count, I have not had time sufficient to digest the pre-trial points and authorities and to crystalize my thinking thereon, and the trial will have to develop the facts and the law.

Mr. Roth: Counsel and myself have had, prior to today, [3] several telephone conversations in respect to the course of this trial, and it was suggested by myself, and consented to by him, subject, of course, to the approval of the court, that we proceed on count one, because that count, if decided favorably to the plaintiff, is decisive of the lawsuit, and if it is decided adversely, then that we proceed on count four and the counterclaim, because, if count one is, as I say, decided for the plaintiff—and that has just a few questions of fact which have already been

pointed out, the estoppel facts, or the alleged estoppel facts, as far as the counts are concerned, then it resolves itself into an argument on questions of law, and if that method of proceeding is satisfactory to your Honor, I think it would shorten these proceedings and avoid the taking of quite a bit of testimony that may prove to be immaterial.

Mr. Cooper: Counsel is correct, your Honor, and I might add that, as far as defendant is concerned, that procedure will be satisfactory. And I make the further suggestion, in the interest of simplifying the issues, that, as far as the defendant is concerned, we could forget the counterclaim and the request for an injunction, because, first, if the court should decide for the plaintiff, it would be immaterial, and, secondly, should the court hold for the defendant, we are satisfied the defendant would not violate the terms and provisions of the contract.

The Court: I gather, then, that this suggestion, coming [4] from both sides, is designed to get at the heart of the case, and may render it unnecessary to go into matters that would prove collateral in the event of a certain decision on count one.

Mr. Cooper: That is correct, your Honor.

The Court: I am impressed with the advisability of proceeding along those lines, and that may be done.

Mr. Roth: If your Honor please, I had also an agreement with counsel prior to this date in respect of his first amendment to the answer and in respect of the second amendment to the answer, to the effect that all the allegations therein may be deemed to have been denied by the plaintiff.

Mr. Cooper: It is so stipulated, your Honor.

Mr. Roth: On the point that your Honor mentioned at the outset, in regard to count two, that is, that it may not

be within the jurisdiction of the court, we have researched the point somewhat, but, of course, would be happy to submit authorities to your Honor on that point.

The Court: Very well.

Mr. Roth: Shall we proceed, your Honor?

The Court: Yes.

Mr. Roth: I will call Mr. Oscar Cummins. [5]

OSCAR CUMMINS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Oscar Cummins.

Direct Examination

Q. By Mr. Roth: Your full name is Oscar Cummins?

A. Oscar Richard Cummins.

Q. You are an attorney at law regularly licensed to practice in all the courts of California, and have been such for some years last past? A. I am.

Q. Do you know Robert Cummings, the plaintiff in this case? A. I do.

Q. How long have you known him?

A. About six years.

Q. During the past two years prior to this time have you represented Robert Cummings in the capacity of attorney and business manager? A. I have.

Q. You were representing Robert Cummings during the period of time between April 1, 1943, and June 2, 1943? A. Yes.

Q. Did you, on or about May 26, 1943, appear at the offices of Universal? [6] A. I did.

(Testimony of Oscar Cummins)

Q. Will you state to the court what you went there for and what you did?

A. On May the 26th, on or about 2:30 p. m., I went to the paymaster's office at Universal Studios and asked the paymaster if there was a check there for Robert Cummings, and he leafed through the checks and told me there was no check for Bob. From there I went over to the cashier's office and saw Mr. Steinberg, and I asked him if there was a check there for Robert Cummings, and he said, "Wait a minute," and he went to some files, and came back and said, "No, there is no check for Robert Cummings. He is still under suspension."

Q. What did you do then—go back to your office?

A. I went back to my office.

The Court: May I interrupt for just a moment. Mr. Reporter, will you read that answer slowly?

(Answer read by the reporter.)

Q. By Mr. Roth: What did you do then, Mr. Cummins?

A. The next morning at 11:00 o'clock, Thursday, I called Universal Studios, Stanley 7-1211, and asked for the cashier's office. I said, "This is Oscar Cummins speaking. Is Robert Cummings' check ready?" The man who answered the phone said, "Wait a minute," and came back a few moments later and said, "Bob's check is not ready. We have no instructions to put him back on salary." [7]

The Court: Mr. Reporter, will you read that slowly?

(Answer read by the reporter.)

(Testimony of Oscar Cummins)

Q. By Mr. Roth: Did you get the name of the man to whom you spoke over the telephone?

A. No, I did not.

Q. What did you do after that telephone conversation on Thursday morning?

A. On or about 11:30 I instructed my secretary, Miss Bella Marco, to call Universal Studios and ask for the cashier's office, and I also instructed her to put me on the line as soon as she got the cashier's office. And she called Universal Studios, and pressed the button in my office, and I got on the line with her. I heard her ask the man who answered the phone in the cashier's office, "Is Robert Cummings' check ready?" And the answer came back a few moments later. He said, "Wait a moment," and he came back and said, "Robert Cummings' check is not ready," or "Bob's check is not ready"—I don't remember the exact words—"He is still under suspension."

Q. After that telephone conversation between Bella Marco and someone in the cashier's office at Universal, which you listened to, what, if anything, did you do?

A. I instructed my secretary, Miss Marco, to call Jimmie Smith, Robert Cummings' man, and ask him to go over to Universal and see if there was a check there for Bob.

Q. And then what, if anything, did you do? [8]

A. That is all.

Q. Except that on May 29th you sent this wire from Robert Cummings to Universal?

A. That is right.

Q. Which is set forth in the complaint?

A. That is right.

(Testimony of Oscar Cummins)

Q. Prior to appearing at Universal on Wednesday, May 25, 1943, you had had contacts with many officials of Universal in respect to Bob Cummings, had you not?

A. On repeated occasions.

Q. And you had, on numerous occasions, either personally or through messenger, picked up his check, Bob Cummings' check, in payment of his services?

A. That is correct.

Q. And on those occasions what would you do?

A. I would go to the paymaster's office and the check was usually there.

Q. Between April 10, 1943, and May 29, 1943, did any officer, official, executive or employee of the defendant Universal Pictures Company, Inc., request you to produce Robert Cummings at the studios, or have him at the studios for the purpose of performing services?

A. No.

The Court: May I have that question?

(Question read by the reporter.)

Q. By Mr. Roth: And when I say "request," I mean request [9] orally. A. No.

Q. Do you know whether or not any such request was made between those dates, any such oral request was made between those dates by any official, director, agent or employee of Universal on Robert Cummings?

A. No; there was no such request.

Mr. Roth: You may cross examine.

(Testimony of Oscar Cummins)

Cross-Examination

Q. By Mr. Cooper: I show you a document, which I have heretofore shown to counsel, dated November 27, 1941. Is that Robert Cummings' signature?

A. Yes.

Q. You mailed that in, did you not, to Universal?

A. I don't know whether it was mailed or given to them.

Q. You caused it to be sent to Universal on behalf of Robert Cummings?

A. I think so. I am not certain.

Mr. Cooper: If your Honor please, I offer this in evidence as Defendant's Exhibit A.

Mr. Roth: We object to it on the ground that it is not proper cross examination.

Mr. Cooper: That may be true.

Mr. Roth: But if counsel at this time wants to mark it for identification and its relevancy subsequently appears, we won't quarrel with the authenticity of the document and [10] may stipulate to its admission.

Mr. Cooper: Counsel's technical objections are absolutely correct. I was trying to save a little time.

The Court: It may be marked for identification as Defendant's Exhibit A.

Q. By Mr. Cooper: Mr. Cummins, you were interested, as chief representative of the plaintiff, Robert Cummings, in all his negotiations and matters with the defendant Universal Pictures Company, Inc.; is that correct?

Mr. Roth: That is stipulated, isn't it?

Mr. Cooper: I want to get it fully. A. Yes.

Q. By Mr. Cooper: And you were also his attorney during the period of time in question? A. Yes.

(Testimony of Oscar Cummins)

Q. And you had such authority from Robert Cummings personally? A. Yes.

Q. You have dealt as an agent with Universal Pictures Company for a considerable period of time, have you not, Mr. Cummins, not on behalf, necessarily, only of Robert Cummings, but of others as well? A. Yes.

Mr. Roth: Objected to as immaterial.

Mr. Cooper: It is purely a preliminary question.

Mr. Roth: I will withdraw the objection. [11]

A. Yes.

Q. By Mr. Cooper: You are familiar with the personalities of the employees of the contract department?

A. Yes.

Q. You know most of the officers of the corporation, that is, those that are situated at Universal City?

A. Yes, sir.

Q. And you had negotiated in the past, in connection with matters concerning the contract of Robert Cummings, with Edward Muhl, head of the contract department, had you not?

Mr. Roth: We object on the ground that it is incompetent, irrelevant and immaterial, and it appears already that it is not preliminary, as counsel states, but it is being indulged in obviously for this purpose—

The Court: I don't think it is pertinent to the direct examination.

Mr. Cooper: If your Honor please, it is with reference to the question as to the individuals upon whom the requests were made, and why he made the requests of those individuals, rather than upon the particular officers of the corporation that, as a matter of law, were the ones upon

(Testimony of Oscar Cummins)

whom a demand should be made and who had authority to order payment. I call your Honor's attention to one of the answers of the witness, that on May 27th, when he said he called the offices and talked to some man there, and the man to whom he [12] talked told him he had no instructions to put Robert Cummings back on salary, and obviously the person to whom he talked only paid checks on instructions. The purpose of this question is to show that he did not talk with anyone at Universal Pictures Corporation who had the authority to give instructions, to order the payment of the check.

Mr. Roth: Obviously that is a matter of law.

Mr. Cooper: That is correct.

Mr. Roth: In spite of counsel's statement, the purpose of this particular examination, which is not cross examination, is obviously this, that is, that because the witness knew these various other executives and prominent personnel who were associated with the defendant, that he should have gone to them instead of going to the paymaster or the cashier.

Mr. Cooper: There isn't any question about that.

Mr. Roth: And it is not cross examination, and it is not material. If it is a question of law, and if, as a matter of law, we should have that, that is already before the court, and we can argue it.

The Court: It seems to me that what is sought now might properly be a part of defendant's case, but I am not persuaded that it is a part of the cross examination of this witness. In other words, the question is, has this witness testified truthfully, not what is the legal effect of that testimony.

(Testimony of Oscar Cummins)

Mr. Cooper: I don't quarrel with the veracity of the [13] witness, but I certainly think we have a right on cross examination to show the color of the shadow. Even though we do not necessarily have to attack the veracity of a witness on cross examination, we may bring out the full picture and the light and the color of the shadow.

The Court: I rather think you will need to put that in as part of your case.

Mr. Cooper: Very well. I won't quarrel with the court on that.

Q. By Mr. Cooper: Now, you stated in your direct examination that you had been in the habit of picking up Mr. Cummings' check and that you usually found it there. What did you mean by that?

A. At the time that Bob Cummings was supposed to be on salary, I went to the paymaster's office and there the check was.

Q. Did you mean to imply that on some occasions it had not been there, that there were occasions when the check was not there when you went there?

Mr. Roth: I object to that as incompetent, irrelevant and immaterial. If we are going to go into that, it would be necessary to go into a specific set of circumstances.

The Court: I am wondering if we would not find ourselves involved in trying perhaps some of these matters that were eliminated when the third count was dismissed.

Mr. Cooper: If your Honor please, that isn't my purpose [14] at all. Very briefly, I am going back to the general subject matter of my preliminary question. I think this is quite proper cross examination, because the

(Testimony of Oscar Cummins)

question was asked by counsel, and he said that when he went there the check was usually there. I want to find out what he meant by the word "usually."

The Court: May we have the pending question?

(Pending question read by the reporter.)

The Court: I think the witness can answer that question.

A. The answer to that is this, your Honor: On no occasion when the check was supposed to be there was it not there. There were frequent occasions when, for a day or two, they wouldn't pay Bob for a day or two, and I went there and argued about it. When the checks were supposed to be there they were usually there.

Mr. Roth: Pardon me a second. May I interject and ask the witness a question?

Mr. Cooper: I have no objection to an interruption, counsel.

The Court: I rather think you will make better progress if you will—

Mr. Cooper: Very well.

Q. By Mr. Cooper: On those occasions when you would not find the check there, for whatever reason it was, you would go to someone else, would you not?

Mr. Roth: That is not his testimony. I object to it on [15] the ground that it assumes a fact not in evidence.

Mr. Cooper: Maybe I misunderstood the witness. I have no objection to your asking a question to straighten it out. Will you please read the last answer of the witness?

(Record read by the reporter.)

Q. On those occasions, Mr. Cummins, did you go to the paymaster's office— A. Yes.

(Testimony of Oscar Cummins)

Q. And, for whatever reason it might be, there was not a check there, when you thought it should be there?

A. I didn't say that.

Q. On those occasions when you went to the paymaster's window and asked for a check and the check wasn't there—

A. I didn't say that either.

Q. What did you say, then?

A. I said on occasions when Bob worked a day or two extra, and his check wasn't there, or it wasn't in the proper amount, then I would ask about it.

Q. Let me ask you this question: Did you ever go there when, for one reason or another, you thought a check was supposed to be there and didn't find one there? There were such occasions, were there not, Mr. Cummins?

Mr. Roth: Will you let the witness answer one question at a time? I think the first question is objectionable, but I didn't object.

The Court: Will you split the question? [16]

Mr. Cooper: It is the same question, if your Honor please, and, of course, it is leading, but we have permitted some leading questions on direct examination. The second portion of the question may be stricken.

The Court: Then will you read the question?

(Question read by the reporter as follows: "Let me ask you this question: Did you ever go there when, for one reason or another, you thought a check was supposed to be there and didn't find one there?")

A. As amended, I don't remember such an occasion.

(Testimony of Oscar Cummins)

Q. By Mr. Cooper: In your earlier testimony on cross examination you said that sometimes a check was one or two days late?

A. I didn't say it was one or two days late.

Mr. Roth: I object to the question on the ground that it assumes a fact not in evidence.

The Court: The witness has already answered that that was not his testimony. It begins to look like possibly an expression was used by the witness that may well have been confusing. As the interrogation has proceeded, it begins to develop that he did not use apt or exact language in answer to the earlier question.

Mr. Cooper: Very well, your Honor. I will make it quite clear.

Q. Is it your testimony, then, that you recall no occasion of going for a check when you thought one should be [17] there, to find that it was not there?

A. That is substantially correct.

Q. On one occasion when you went there you found a check was there which you believed to be an incorrect amount?

A. Yes.

Q. There were such occasions?

A. Yes.

Q. And you then went to whom?

A. Generally to Mr. Muhl.

Q. Who was head of the contract department?

A. That is right.

Q. And the matter would either be explained or straightened out?

A. I either got the money or didn't get it.

Q. It was either explained or straightened out?

A. Yes.

(Testimony of Oscar Cummins)

Q. On May 26th you said you first went to see the paymaster? A. That is right.

Q. Is that the paymaster, Mr. Steinberg?

A. No. There was a paymaster out there at Universal who had all the checks of the employees, the contract players, and all other employees.

Q. And you merely made inquiries for the check, whether or not there was a check for Bob Cummings, or words to that effect? [18] A. That is right.

Q. Then you went to the cashier?

A. That is right.

Q. Where is the cashier's office with respect to the paymaster's window?

A. Right around the corner.

Q. And you saw Mr. Steinberg, the cashier?

A. Yes.

The Court: Do I understand that Mr. Steinberg was the cashier at this time?

Mr. Cooper: That is the testimony of the witness, that Mr. Steinberg was the cashier.

A. That is the man I saw.

Mr. Roth: I don't think that is the fact.

Mr. Cooper: That is the reason for the question. Will you stipulate that Mr. Steinberg was paymaster and not cashier?

Mr. Roth: The only way I knew the fact was from the affidavits on file.

Mr. Cooper: Counsel, I wouldn't have asked for the stipulation, only I thought it was from your own personal knowledge.

(Testimony of Oscar Cummins)

Q. By Mr. Cooper: In any event, the second person you saw was the cashier? A. Steinberg.

Q. Did you go to the cashier's office?

A. I went to Steinberg's office. [19]

Q. What made you think he was cashier?

A. That is the information I had.

Q. Is there a cashier there, do you know?

A. If he states that Steinberg is not the cashier, I don't know.

Q. You have a positive recollection that you saw Mr. Steinberg personally? A. Yes.

Q. During the time, on May 26th and May 27th, that you made these requests for Robert Cummings' checks, or check, rather, did you ask Edward Muhl whether a check was ready? A. No.

Q. Did you ask Cliff Work if a check was ready?

A. I probably couldn't have gotten to his office.

Q. Did you ask Dan Kelley if his check was ready?

A. No.

Q. Did you ask anyone in the contract department?

A. No. It wasn't necessary.

Mr. Cooper: I move to strike "It wasn't necessary," as a voluntary statement.

The Court: That may go out.

Q. By Mr. Cooper: Did you want the check?

A. Certainly.

Mr. Roth: I would like to have an objection appear before the last answer, and ask that it be stricken, on the ground that the question is objectionable and calls for a state of [20] mind, which is not testified to or sub-

(Testimony of Oscar Cummins)

stantiated by the evidence. It is not proper cross examination. What the intentions of this witness were are immaterial to this lawsuit.

The Court: I am not clear as to just the basis for that objection. Suppose, for illustration, that the plaintiff's agent were to admit that he went to the studio and likewise carried on these telephone conversations, not for the purpose of discharging or seeking to enforce any of plaintiff's rights, but merely to mislead the defendant, that would be purely in his mind, of course. It is true that it would not rest with the witness to say on direct examination that he was acting in good faith. That will have to be determined by the facts and the circumstances as they transpired.

Mr. Roth: I objected to this question because I considered it a fly question and asked for the purpose of imputing that there might not have been good faith. The only way the court can determine whether or not there was good faith in this demand is by what the plaintiff actually did. In his secret heart, let us assume, for the purpose of argument, that the plaintiff hoped that they would not perform their contract, if he nevertheless went there and performed his obligations and made his demands, what his secret hopes were wouldn't make any difference; the motive wouldn't make any difference. The witness has already answered the question, but my point is that thereafter, if [21] they had that hope—Mr. Oscar Cummins or Robert Cummings—if they performed their contract, Universal was bound to meet the demand. That is our point. I see ramifications and implications as to the significance of the question, which I don't care to argue at this time, because, for instance, I would rather

(Testimony of Oscar Cummins)

not make mention of what I think is in the mind of counsel by this question. It is not an accidental question; it is a calculated question.

The Court: Only to the extent that it may serve to throw any light on the credibility of any other testimony of the witness.

Mr. Roth: If that is the purpose of the question, I withdraw my objection.

The Court: That is the sole theory on which it is a proper question.

Mr. Roth: I withdraw my objection.

Q. By Mr. Cooper: On occasions when there had been disputes in the past on matters of salary and other things in connection with the contract, you had always taken the matter up with Ed Muhl, had you not?

Mr. Roth: Objected to as immaterial and not proper cross examination.

The Court: It is not clear as to the theory upon which this line of interrogation is being pursued. In other words, does the defendant dispute the testimony of the witness to the effect that ordinarily checks for the plaintiff [22] would be found in a certain office, that that is the way the defendant transacted its business and established a practice which employees, such as the plaintiff and his representatives, followed, and that, consistent with that practice, the plaintiff's representative called at the paymaster's office and requested a check, presumably representing compensation for the plaintiff, and that the check was not given?

Mr. Cooper: If your Honor please, I do not dispute that at all. As a matter of fact, we will concede that no

(Testimony of Oscar Cummins)

check was ready, that defendant did not intend to have a check ready. There isn't any question about it. That is a fact, and that is our position; none was ready and none was intended to be ready. But, if your Honor please, this is an equitable proceeding. Plaintiff is asking the court to terminate this contract. And we pleaded in the answer, and I intended the implications of the former question. It is our contention, if the court please, that the witness' so-called demand was not made in good faith. This witness knows, and it is a contention of the defendant, that the man he should have seen was Edward Muhl or one of the executives of the studio, as he had done in the past.

Mr. Roth: There is no showing that he did that in the past. We object to that statement. I want to apologize to counsel for the use of the word "fly."

The Court: May we have the pending question? [23]
(Question read by the reporter.)

The Court: It strikes me that you are now going into the field of your defense, namely, that there are equitable factors here which would justify concluding that the plaintiff is not entitled to the relief he seeks. But I do not think it is pertinent to the direct examination.

Mr. Cooper: With due deference to the court, I think I should suggest that they are pertinent to that issue, but, nevertheless, I sincerely suggest to the court that it is also proper cross examination. Here is a witness who testified with respect to making the demand, and certainly we have the right to find out why he didn't make the demand upon the proper person. We are not limited in cross examination to the literal words and questions of the direct examination.

(Testimony of Oscar Cummins)

The Court: Now, whether or not plaintiff should have made any demand at all on the theory of the first count I don't think is an element essential to the plaintiff's right to recover. In other words, the contract required payment without any demand. If there was some breach or failure on the part of the plaintiff, to relieve the defendant from making the payment, that is something separate and distinct from whether or not he went to the right place to make a demand.

Mr. Cooper: I wil agree with your Honor in this.: That, assuming that payment was due, would be due him without a [24] demand—there isn't any question about that—but, if your Honor please, there is another question involved, a very important question involved in this equitable proceeding; did the plaintiff do equity? Did he do the right thing in good conscience? It is a very important question in determining the question as to whether or not he is entitled to a rescission and termination of the contract, as distinguished from the money due him. Assuming, for the purpose of argument, that that might have been the case, which we do not concede, if your Honor please, but that that might have been a very important technical point to consider—I am not going to argue the law, as it is set forth, if your Honor please, in the—

The Court: It is my thought that if there were any other circumstances which protected the defendant from the usual consequences ensuing upon a failure to perform one of the most important parts of the contract as far as the plaintiff is concerned, namely, payment, those are matters which are peculiar to the defense. In other words, if this case rests upon a state of facts which disclose that the plaintiff was not paid at the time, in so far as the

(Testimony of Oscar Cummins)

evidence discloses, that payment was due, and that the defendant did nothing. I don't think we need any more equitable elements to entitle plaintiff here to a decree. If there are these other factors which would indicate, taking into account various pertinent circumstances, that [25] the plaintiff should have done other than he did, those are matters which I think are proper to be brought out, but not as part of the cross examination of this witness, because I don't think the plaintiff needs to establish anything more in order to obtain a decree than that he wasn't paid at a time when apparently he should have been paid.

Mr. Cooper: Well, I am not going to argue it. I don't think the matter is of sufficient importance to argue about it further at this time. I note an exception. And, in the interest of time, I will proceed with another question.

Q. By Mr. Cooper: You had a conversation, did you not, with Mr. Ed Muhl on the 28th of May—to refresh your memory, at the hour of 10:06 a. m., May 28, 1943? To refresh your memory, it was the day before you made your—you sent the notice of May 29th. a day or two after the alleged request for payment?

A. I don't remember whether I had a conversation on that day or not.

Q. Solely for the purpose of refreshing your recollection as to the conversation—I do not intend to go into this phase of the conversation, if the court please, except solely for the purpose of refreshing his recollection as to the particular conversation—Do you recall a conversation with Edward Muhl wherein you discussed the PRC?

A. Yes.

(Testimony of Oscar Cummins)

Q. Now, do you recall that that conversation took place [26] at 10:06 a. m. on the 28th of May, 1943?

A. No, it did not. It occurred after the breach, after the notice was sent.

Q. In other words, it is your testimony, then, that the conversation in which you discussed the PRC was definitely and unequivocally after May 29th?

A. No; I am not certain whether the conversation about this PRC was in April or May. I think the conversation as to PRC was in April.

Q. Then you do recall having a conversation with Edward Muhl about PRC?

A. Yes.

Q. Are you certain whether that was before or after May 29th?

A. I think it was sometime in April. I think at that time Mr. Muhl called me on the telephone and asked me—it was after the completion of the picture called “Fired Wife,” and that was in April, when Muhl called me and asked me if I had heard that Metro was interested in Robert Cummings, and I said no, that PRC had called me, but I didn’t know anything about Metro. I am quite certain as to that.

Mr. Cooper: If your Honor please, so that I can tie down this conversation—I do not offer this to prove the substance of the conversation, but so that I might fix the conversation. This was the conversation I am referring to, which was substantially as follows. This is not proof of the [27] conversation, but merely to establish the conversation, so that we can fix the date. The conversation that I have reference to is the conversation at which Mr. Muhl called you and said he had heard that Robert Cum-

(Testimony of Oscar Cummins)

mings had been offered to Metro, and you stated that you didn't know anything about it, but that you had heard something about PRC, a producing organization that you had never heard of before, and that they had called you, asking about Cummings' availability. Is that the substance of it down to that point, just for the purpose of fixing the time of this? I intend to offer the substance of it in our defense.

Mr. Roth: I feel compelled to object, on the ground that it is not proper cross examination. I didn't object at first, because I asked the witness on direct whether he had any conversation with officers of Universal, and on that theory I think the question is perfectly admissible on cross. Then counsel stated preliminarily, when he tried to ask his question, that he was asking it for the purpose of fixing the time, and I didn't object to that. Mr. Cummins is going to be here; he is available. If the questions you are now propounding to Mr. Cummins are going to be relative to your defense, which I am not conceding, you will have an opportunity to call him and put him on in regular order.

Mr. Cooper: Let me withdraw that last question.

Q. By Mr. Cooper: Referring now to this PRC conversation, which you say now, to the best of your recollection, was [28] some time in April—am I correct so far? A. Yes.

Q. In that PRC conversation did you suggest to Mr. Muhl anything about Bob Cummings' check not having been paid?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, it being evident from the question itself that

(Testimony of Oscar Cummins)

he couldn't have, at that time, in April, because the check wasn't there in April.

Mr. Cooper: That is correct. Off the record: I wanted to fix that conversation, because it is our contention that that conversation took place the day after the alleged demand was made and the notice was sent, that he did have a long conversation with Ed Muhl, in which many things were discussed, and not a thing was mentioned about this angle. That is why I was so anxious to fix the conversation, not for the purpose of proving the truth of the conversation, but so that we might fix the time.

Mr. Roth: If it is not for the purpose of proving the truth of the fact—

Mr. Cooper: No.

Mr. Roth: Then it is not proper cross examination. I didn't go into any conversation with Ed Muhl as to demanding the check. The witness already testified, in answer to one of counsel's questions, that he didn't make a demand on Ed Muhl or any of these officers, and if there is any relevancy to this, I think it ought to be in proper form, so that I [29] at least can have some information as to what the purpose of the question is.

The Court: Let me interrupt to point this out: The witness having testified that he had no conversation with anyone representing the defendant on the subject matter of the check or compensation for plaintiff, except those whom he has referred to on direct examination, it would seem to me that you already have the answer, so far as

(Testimony of Oscar Cummins)

there is any answer relevant on cross examination to the question or series of questions you have been asking. If you seek further to show that there was a conversation between this witness and some officer or representative of the defendant during the period that is covered by the witness' direct examination, it is not clear to me what difference it would make that he did have such a conversation. He already conceded that he didn't talk to anybody else, as far as the defendant was concerned, on the subject matter of plaintiff's compensation.

Mr. Cooper: I feel that this is a perfectly proper question, and a necessary question, as a foundation for the conversations which were later held.

Q. By Mr. Cooper: Is it not a fact that on May 28, 1943, at the hour of 10:06 a. m., you received a phone call from Edward Muhl, in which he stated to you that he had heard a rumor that Metro was interested in Robert Cummings, and did you know anything about it, and you stated that you didn't [30] know anything about it, and you further stated that PRC, a producing organization that you had not heard of before, had called you and asked about Cummings' availability, and you advised that Cummings was engaged in work in connection with the establishment of an air shuttle service, and if anybody wanted him they would have to see General Arnold, of the Army Air Corps, to get him. You then asked Mr. Muhl why he was disturbed about it, and Mr. Muhl said

(Testimony of Oscar Cummins)

to you that he wasn't disturbed, that he merely considered it a rumor, but decided to get you, since you would know all about it and have it disproved. He then said that he wanted to know if anybody had suggested to Metro that Cummings' suspension had been terminated or that he was in any way free of his contract with us or free to work with anybody else. And you said you were positive there was nothing like that. Did you have such a conversation on May 28th, in substance or in effect?

Mr. Roth: Objected to as immaterial and not proper cross examination, and anticipating the defense.

The Court: I am inclined to think that, on the ground that it is not proper cross examination, the objection is well taken, and that will be the ruling.

Mr. Cooper: Very well. I do not want to intentionally prolong it, but just to save time, I will ask this.

Q. By Mr. Cooper: Didn't you further have a conversation on the 3rd day of June, 1943, first over the telephone, and [31] second, at Ed Muhl's office, wherein, in effect, you admitted that you had had a phone conversation on May 28th, in which—

Mr. Roth: That is objected to as not proper cross examination and immaterial.

The Court: It is not cross examination. Sustained.

Mr. Cooper: Very well. There are no further questions, if your Honor please.

Mr. Roth: That is all. Call Bella Marco. [32]

BELLA MARCO,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Bella Marco.

Direct Examination

Q. By Mr. Roth: Miss Marco, will you keep your voice up? A. All right.

Q. You reside in the County of Los Angeles, do you not? A. Yes.

Q. And are you engaged as secretary by Mr. Oscar Cummins? A. Yes.

Q. And you have been engaged in that capacity by Mr. Oscar Cummins for at least two years last past?

A. About a year and a half.

Q. Were you employed by Mr. Oscar Cummins in the month of May, 1943? A. Yes, I was.

Q. Do you recollect having been instructed by Mr. Cummins sometime in the month of May to make a telephone call to Universal Pictures Company, Inc., the defendant in this action? A. Yes, I do.

Q. Can you fix the time of that instruction?

A. It was May 27th. It was around 11:30 a.m.

Q. May 27, 1943? [33] A. Yes.

Q. Will you tell us what Mr. Cummins said to you and what you did?

A. Mr. Cummins told me that he had called Universal, and he would like me to call them and buzz him when I got them on the line, that he would like to listen in on the conversation, and to get the cashier's office on the phone.

Mr. Cooper: I am not going to object to this, but I suggest that that would be a violation of the Federal Communications Act.

(Testimony of Bella Marco)

Mr. Roth: Listening over the telephone?

Mr. Cooper: Yes. I will withdraw it, but I merely suggest that.

Mr. Roth: We will take that chance.

Mr. Cooper: I am not going to make the objection. But there is a Circuit Court of Appeals decision to that effect.

Q. By Mr. Roth: Miss Marco, tell us who you called and what the conversation was.

A. I called Universal and asked for the cashier's office, and a man answered, and I told him then that this was Bella Marco, Mr. Cummins' secretary, and that I would like to know if there was a check for Bob Cummings. He said, "Just a moment; I will see," and he left the phone and returned shortly, and told me there was no check for Bob Cummings, that he was on suspension.

The Court: May I interrupt just a moment? Very well. [34]

Q. By Mr. Roth: After you had finished your telephone conversation did you get in touch with Mr. Smith?

A. Yes. Mr. Cummins asked me to get in touch with James Smith, which I did.

The Court: The same day?

A. Yes, sir; right away.

Q. By Mr. Roth: James Smith was employed by Robert Cummings? A. That is right.

Q. Did you talk to James Smith?

A. Yes. I called him and asked him if he would go over to Universal and see if there was a check ready for Bob Cummings.

Mr. Roth: You may cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all, Miss Marco. Mr. Smith. [35]

JAMES SMITH,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. James Smith.

Direct Examination

Q. By Mr. Roth: Were you employed by Robert Cummings, the plaintiff in this action? A. Yes, sir.

Q. Were you so employed during the month of May, 1943? A. Yes.

Q. In the latter part of the month of May, 1943, were you requested by Miss Marco, the lady who just left the witness stand, to go to Universal Pictures Company, Inc., and pick up the check of Robert Cummings?

A. Yes, sir.

Q. What did you do?

A. I didn't go over. I telephoned.

Q. Where did you phone from?

A. Mr. Cummings' home.

Q. Where is the home of Robert Cummings?

A. Van Nuys.

Q. Will you state to the court why you telephoned?

A. Trying to save gas, for one reason.

Q. State what you said on the telephone and who you talked to, and what was said on the other end. [36]

A. I called Universal Studios and asked for the paymaster's office.

Q. Were you connected?

A. Yes. And they gave me a name, but I don't remember the name of the paymaster; I don't remember

(Testimony of James Smith)

the name. I asked had Mr. Cummings' check been picked up, and he said, according to his records, that Mr. Cummings was on suspension.

Mr. Roth: Cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all. Call Robert Cummings. [37]

ROBERT CUMMINGS,

called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Robert Cummings.

Direct Examination

Q. By Mr. Roth: Mr. Cummings, between the—

The Court: Just a moment. You are the plaintiff in this lawsuit? A. Yes, sir.

Q. By Mr. Roth: Mr. Cummings, between the date of April 10, 1943, and June 1, 1943, did any officer, executive, agent or employee of Universal Pictures Company, Inc., the defendant in this lawsuit, call you up or converse with you, or make an oral demand upon you to appear at the studio to perform any services?

A. No, sir.

Mr. Roth: That is all.

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, had any demand been made on you on or about the 10th of April, 1943, to appear at the studio?

(Testimony of Robert Cummings)

Mr. Roth: Objected to as not cross examination. It is already proven that such a demand was made, written demand.

Mr. Cooper: No, that isn't true. [38]

Mr. Roth: Yes.

Mr. Cooper: Would you read that again, please?

(Record read by the reporter.)

Mr. Roth: Although I accept the stipulation.

Mr. Cooper: I can't stipulate to it, because that is not a fact.

Mr. Roth: May we have the question?

(Question read by the reporter.)

Mr. Roth: I withdraw the objection.

A. That I can't say, as to the date.

Q. By Mr. Cooper: Let me refresh your memory. This is solely for the purpose of refreshing your recollection. You recall, do you not, that you alleged in your complaint in this action—you read the complaint before you signed it?

A. Naturally.

Q. That a demand was made upon you to perform the role of "Hank" in "Fired Wife," and that you refused to perform that role. You allege that in your complaint. You said it was on or about the 10th of April, 1943. That is the demand that I have reference to.

A. I see.

Q. In what form was that demand made?

A. Was my demand made?

Q. No. Let us get this straightened out.

A. Yes.

(Testimony of Robert Cummings)

Q. You allege in your complaint that you were requested [39] to perform the role of "Hank" in "Fired Wife," that is, Universal made a demand on you to perform the role of "Hank" in "Fired Wife," and you said in your complaint that was on or about the 10th of April, 1943. Are we clear? A. Yes.

Q. In what form did you receive notice from Universal of that demand to perform the role of "Hank" in "Fired Wife"? Do I make myself clear? A. Yes.

Q. All right.

A. I spoke to Bob Speers. We were very good friends—I have forgotten whether it was at his office—but I had many conversations about that, and we talked at length about this picture several times, and Bob, I should say, made what technically would be called a demand on my services by the studio to appear as "Hank" in the picture "Fired Wife" orally, as I remember it.

Q. Did Mr. Cummins, your agent, inform you that he had received a notice in the form of a telegram dated April 10th, as follows:

"Mr. Robert Cummings,
Care Oscar Cummins,
8511 Sunset Boulevard,
Los Angeles, California.

April 10, 1943.

You are hereby instructed to report to us at our studio at Universal City, California, at the office of Mr. Dan Kelley, [40] at ten o'clock Monday morning, April 12, 1943, for the rendition of your services under your contract of employment with us dated November 21, 1938, as

(Testimony of Robert Cummings)

heretofore amended and extended, in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract, as amended and extended.

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl,

Assistant Secretary."

Mr. Oscar Cummins, your agent, informed you that he had received that telegram?

Mr. Roth: That is objected to on the ground that it assumes a fact not in evidence. There is no evidence before the court that Oscar Cummins ever received that telegram.

Mr. Cooper: That isn't the question. The question is, did Oscar Cummins inform him of that. Answer that yes or no.

Mr. Roth: I don't understand that you have a right to go into facts not established by the evidence on direct examination. It is not cross examination, and we object. Will you read the question, please?

(Question read by the reporter.)

Mr. Roth: That is objected to, if your Honor please. That is the same objection we would have to the question, "Have you stopped beating your wife? Answer yes or no." I don't know what the witness' answer is going to be. Oscar [41] Cummins says he never received the telegram.

The Court: The question in its present form is open to criticism. I think it will be necessary to revise it.

Mr. Cooper: I think it will be necessary to pin it down to the period that is relevant.

(Testimony of Robert Cummings)

Q. By Mr. Cooper: Did you know or learn, in any manner, shape or form, on April 10th or 11th, that Universal wanted you at the studio, other than your conversation with Bob Speers?

A. I may have. I don't remember. There was so much talk about it that I don't remember.

Q. Were you informed by anyone that a telegram had come in requesting you to appear at the studio on April 12th, on April 10th or 11th?

A. I only know of the telegrams which I have in my complaint, and the others—there have been so many from Universal that I really can't remember them.

Q. I show you a copy of a telegram, which your counsel has seen, the telegram of April 10th, and ask you to read this telegram.

A. Aloud?

Q. No; to yourself, Mr. Cummings.

A. That I can't say. If I ever received it or not I don't remember.

Q. Did you ever learn of the contents of that telegram from any source between April 10th and April 12th, 1943? [42]

A. Yes. I learned that—not the exact contents of that telegram. I knew that Universal wanted me to play the part of "Hank" in "Fired Wife." It was all public, and every newspaper in town was getting it at that time, and it was a public secret that I had refused to play the part, but whether or not I got it from that telegram I don't know, or whether I ever saw that telegram or not I can't say. It is very familiar there. That is legal terminology, and I have been at two major studios and have seen many such notices, naturally.

(Testimony of Robert Cummings)

Q. Do you recall whether or not your agent, Oscar Cummins, told you at any time on April 10th or April 11th that the studio wanted you for any services at all?

A. Well, I can say this, that naturally we had discussed the making of "Fired Wife" pro and con, and Oscar Cummins and I were so familiar with the subject that Universal did want me to do the picture, that it was unnecessary to discuss whether or not they wanted me, that I don't remember whether we ever needed to discuss it.

Q. Do you recall whether or not you did?

A. I did not.

Q. Do you recall whether or not Mr. Oscar Cummins told you that he had received a telegram from them?

A. I don't know.

Q. Were you in town on April 10th?

A. I can't remember that. [43]

Q. Do you remember where you were on April 11th?

A. No.

Q. April 12th? A. No.

Q. Can you think back? Were you in the Civilian Air Patrol at that time?

A. Yes; I was in the Civil Air Patrol, Glendale, California, was my office.

Q. You owned a Cessna airplane, which you have turned over to the Civil Air Patrol?

A. That is right.

Q. Do you recall, for the purpose of refreshing your recollection, as to where you were on April 10th, 11th and 12th, 1943, as to whether or not you were out of the State of California?

A. It could be possible.

(Testimony of Robert Cummings)

Q. Do you recall where your airplane was at that time?

Mr. Roth: Objected to as not cross examination and immaterial.

The Court: I am trying to see in what respect your present line of interrogation bears upon the direct examination.

Mr. Cooper: If your Honor please, he said that no demand was made upon him, and, with counsel's permission, I would like to approach the bench. I don't like to state the reason out loud, because the witness is on the witness stand. [44]

The Court: In other words, it is conceivable that no demand was made upon this witness because, let us say, he could not have been contacted?

Mr. Roth: I suspected that. Irrespective of what may be in Mr. Cooper's mind, I don't think it is necessary to approach the bench. I will withhold any objection.

Q. By Mr. Cooper: Did you fly your plane during the month of April, 1943—I mean this Cessna plane?

A. My plane—I don't think so. As I recollect, my plane was donated to the United States government, to be used on anti-submarine patrol in the Gulf of Mexico. That donation was made voluntarily I think sometime around the first of the year, before April.

(Testimony of Robert Cummings)

Q. Let me ask you this.

A. And I was not flying my airplane at that time, and, naturally, I had 64 planes at my disposal, and—

Q. What I am particularly trying to find out is where you were on April 10th. A. I wish I knew.

Q. Would it help you to know that your plane was in El Paso on April 5, 1943?

A. Yes. That substantiates my recollection, which I gave you formerly, that I had donated the plane to the United States government, because they put it on anti-submarine patrol, the Azores Patrol.

Q. Patrol No. 2? [45] A. No.

Q. Very well.

A. And therefore I couldn't have been flying it, because the plane was flown to El Paso for delivery to the government by another party.

Q. That does not help refresh your recollection as to where you were? A. I am sorry, it does not.

Q. Let me ask you this question: When you are out of town do you leave anybody at your home? Does anybody stay at your home, or does your man servant, Mr. Smith, go with you on occasions?

A. On occasions, yes. He has flown across the country with me. And usually at my home there was somebody there. Naturally, in these present times it is not always possible to have somebody there, but usually there was somebody at my home. But I usually referred all messages and communications to 527 California Bank Building, in Beverly Hills.

(Testimony of Robert Cummings)

Q. That is Oscar Cummins?

A. Oscar Cummins' office. And my secretary, Bella Marco, was usually there to take them, except on Saturdays and holidays.

Mr. Cooper: If your Honor please, that is all that I have to ask at the present time on cross examination.

Mr. Roth: That is all. [46]

Mr. Cooper: He will be available, however?

Mr. Roth: Yes. At this time there is one correction of an error which counsel for defense inadvertently made in a question he asked. The complaint, I believe, was verified by counsel, and not by Robert Cummings. I didn't object to the question. It didn't make any difference, but I suggest it, to cure the record.

Mr. Cooper: You mean Robert Cummings didn't sign the complaint?

Mr. Roth: No. He was out of town.

Mr. Cooper: I didn't know that.

Mr. Roth: We rest on the first count, and on the second count, assuming that we can satisfy the court that the second count is before the court.

Mr. Cooper: May it please the court, at this time we will make a motion for dismissal. I do not care to argue the matter at this time, because we may be going over ground that we will be going over possibly later.

The Court: The motion is denied. [47]

DEFENSE.

Mr. Cooper: Call Mr. Robert Speers.

ROBERT SPEERS.

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Robert Speers.

Direct Examination

Q. By Mr. Cooper: Mr. Speers, what is your business or occupation?

A. I am a casting director at Universal Studios.

Q. And you have been such for how long?

A. Approximately two years.

Q. Do you know the plaintiff in this case, Robert Cummings? A. Yes, I do.

Q. As Mr. Cummings stated on his direct examination, you and he are good friends? A. That is right.

Q. In addition to being associated at the studio?

A. That is true.

Q. Did you have occasion some time during the month of April, 1943, to have some conversation with the plaintiff with respect to the possibility of his portraying the role of [48] "Hank" in "Fired Wife"?

A. Yes, I did.

Q. Now do you recall having a conversation with him on or about the 3rd day of April, 1943?

A. Yes, I do.

Q. Now, you filed an affidavit in this court, dated October 21, 1943, did you not? A. That is right.

Q. A copy of which I show you.

(Testimony of Robert Speers)

Mr. Roth: Are you showing him a copy of his affidavit?

Mr. Cooper: Yes. You have it, counsel.

Q. By Mr. Cooper: You have gone over this affidavit since you made it, have you not?

A. Yes, sir.

Q. In fact, as late as yesterday afternoon, with me?

A. That is right.

Q. In your affidavit of October 21, 1943, you refer to a conversation of April 10th and a conversation of April 12th, 1943. Do you recall the conversations that you referred to in your affidavit? A. Yes, I do.

Q. Since making that affidavit have you refreshed your memory as to whether or not the dates of April 10th and April 12th were the correct dates? A. I have.

Q. And from what have you refreshed your memory?
[49]

A. From several sources. I consulted the people in my office, and I consulted the studio files, and discovered therein a letter which was written by the company to Mr. Cummings, dated April 9th, which fixed the approximate time of my conversations with Bob and indicated that the original date—that I was in error on the original date.

Q. Directing your attention to the 10th of April, 1943, did you have before you on your desk, on the 10th of April, 1943, which was a Saturday, I believe—is that correct? A. Yes.

Q. The telegrams of April 10th, which will be discussed later? A. Yes, I did.

Q. The telegrams have reference to telegrams addressed to Robert Cummings? A. Yes.

(Testimony of Robert Speers)

Q. How many in number were there?

A. As I recall it, there were three.

Q. You know that date to be some time—

A. That was April 10th.

Q. And did you have the conversations that you set forth in your affidavit of October 21st, on the day you had those telegrams on your desk?

A. No, I did not.

Q. Approximately, then, what date would you say you had the conversation which your affidavit sets forth to be April [50] 10th?

A. I am quite sure I had a conversation on April 3rd, and then a subsequent conversation on the 5th, approximately.

Q. Is it possible that that might have been—are you positive that it was on those dates?

A. Yes; approximately on those dates, because I am sure it was over a weekend, and it would have been the previous weekend to those dates mentioned there.

Q. Directing your attention, then, to the conversation you had with Robert Cummings on April 3rd, referred to in your affidavit of October 21st as April 10th, where did that conversation take place?

A. In my office.

Q. Do you recall how he happened to be there? Did you send for him?

A. I think Bob called before he came in and asked if I would be there, and said he was coming in to talk to me.

(Testimony of Robert Speers)

Q. Do you recall whether it was morning or afternoon?

A. I believe the conversation started in the late morning and continued through the noon hour into the early or mid afternoon. It was a rather extended conversation.

Q. Did you have lunch together?

A. No, we didn't eat lunch.

Q. Will you relate the entire conversation you had with him at that time?

Mr. Roth: Might I state, for the purpose of the record, [51] because the court has already ruled on this matter, that I would like to enter a general objection to this line of questions, on the ground that it is incompetent, irrelevant and immaterial, that the defense set forth in the second amended answer is not properly pleaded, and does not contain all of the elements of the defense of estoppel, and therefore is not pertinent to this lawsuit. And may I ask that the objection go to all of this?

The Court: The ruling is that the objection is overruled.

Mr. Roth: And I would like to have an exception.

The Court: And I understand that plaintiff's counsel is asking whether you are prepared to stipulate that he shall be deemed to be objecting to this present line of interrogation.

Mr. Cooper: Certainly.

Mr. Roth: And that I may have an exception, without making the objections specifically to each question.

Mr. Cooper: Certainly.

(Testimony of Robert Speers)

Q. By Mr. Cooper: Will you relate the conversation of April 3rd with Mr. Cummings?

A. Yes. Mr. Cummings came into the office, and we talked of different matters, the health of our respective families, and so forth, and then he said that he had been thinking over again the question of his playing the role of "Hank" in "Fired Wife." And I asked him what his feeling in the matter was at that time, and he said that he was very [52] much troubled about playing the role, had worried about it, and naturally was seriously thinking of refusing to play the role. And I asked him what his objections were to performing the services, and he said that his principal objection was that he didn't feel that the director whom the company had selected for the picture was a suitable director for him, that is, that he felt that Mr. Lamont's qualifications were not such as to make him suitable to direct a picture in which Bob appeared. He also said that he had been troubled about appearing in any photoplay or any picture for some time, because he had been turning over in his mind the advisability or the necessity of his getting out of pictures for the duration of the war, in order to perform services for the government in the Civilian Air Patrol or the Army—I believe he mentioned both of those possibilities—and he doubted the wisdom of an actor in these war times appearing in a frivolous picture, because he thought it might subject the actor to criticism. And I said to Bob that on that particular point I thought it was debatable, because in many cases, after discussing it with people who were active on the Hollywood Victory Committee—

Q. That is what you told him?

A. Yes, that is what I told him. —which is an organization that provides entertainment for the armed

(Testimony of Robert Speers)

forces and for bond drives, etc., the Hollywood Victory Committee had been very much interested in that particular point, and [53] I thought it was debatable whether a young leading man type could appear in public, and particularly before the armed forces, without being criticized as a slacker, or something of that kind, and I had been very much interested to learn that, on the basis of honest judgment, many actors who had gone in, that there had been practically no criticism on the part of troops or public or anybody else, but the feeling seemed to be, generally, that such activity was a definite contribution to the war effort and was a very fine thing. And I brought up the further point that as far as appearing in a picture was concerned, there was a substantial feeling in favor of it in the country and in the armed forces as well.

Q. That is what you said to Bob?

A. That is what I said to Bob in answer to his point. I said that at least a lot of people felt, a good many people felt, that an actor's contribution to the war effort was to provide escapist entertainment, on the theory that it would buoy up public morale as well as the morale of the troops to see these pictures. And I said also that I disagreed on Mr. Lamont's qualifications as a director, that I felt that he was quite competent to direct the picture and do a good job. And I said, furthermore, in view of the fact that the picture in question was about to start, that it was such a late date, that it would be rather unfair to the company, that they had gone ahead with many preparations for the production of the picture, in the way of casting, and so on, [54] for him to refuse to do it at that time. And at the conclusion of the conversation Bob said

(Testimony of Robert Speers)

that he could appreciate some of my points, and, while he didn't entirely agree with me, at least he thought—well, he didn't say "think"—he said he would definitely think the matter over and let me know what his final decision would be. That, as I remember it, is approximately what was said.

Q. Do you recall in that particular conversation any discussion about his ability to perform the services in this part, notwithstanding he joined something? Was that a part of this conversation or a subsequent conversation?

A. Yes. When Bob said he was seriously thinking of entering the service for the duration, I said that, as the representative of the company, I knew I was expressing the company's opinion when I made it clear that I would not want to be put in the position of trying to dissuade him from entering the service or doing anything which he thought was his duty in time of war, because in the past the company had made that clear, that whether a man goes in the Army or whether he goes in the Navy is entirely for him to decide. However, I brought up the point that in view of the shortness of time involved, in view of the fact that the picture was about to start, I considered the question was rather academic, in that whether or not he entered the service either before or at the end of the picture didn't, it seemed to me, make any material difference to the war effort, and that, on the [55] basis of experiences which the company had had, I was quite sure that were he to sign up immediately he still would be permitted, by whatever organization he signed up with, to perform those services and then go into the service, if he wanted to.

(Testimony of Robert Speers)

Q. Now, that was the substance of the conversation?

A. Yes, sir.

Q. I think you said that he said that he would let you know?

A. He said he would think the matter over and let me know.

Q. Did you inform anybody at the studio about this conversation? A. Yes, I did.

Q. Who did you inform?

A. I spoke to Mr. Kelley.

Q. That is Daniel Kelley?

A. Dan Kelley, yes.

Q. Who else?

A. I think I spoke to Emmett Ward.

Q. Who is Emmett Ward?

A. He is a member of the contract department of the studio.

Q. For the purpose of the record, who was Dan Kelley?

A. Dan Kelley is my immediate superior, the executive at the studio in charge of all creative talent, writers, etc. [56]

Q. In other words, it is your present recollection that you informed Dan Kelley and Emmett Ward about the substance of this conversation on or about the 3rd of April? A. That is right.

Mr. Cooper: If the court please, this would be a convenient place or time for the recess.

The Court: Very well. We will take a recess until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p. m. of this day, Tuesday, January 4, 1944.) [57]

AFTERNOON SESSION.

2:00 O'CLOCK.

ROBERT D. SPEERS

(Recalled.)

Direct Examination

(Continued.)

Q. By Mr. Cooper: Mr. Speers, at this morning's session we had just concluded your testimony with respect to your conversation of on or about April 3rd with the plaintiff, Robert Cummings. You stated that he told you that he would let you know, or words to that effect. That was the conversation at your office at Universal Studios. Thereafter did Robert Cummings get in touch with you in some fashion? A. Yes, he did.

Q. In what manner? A. By telephone.

Q. Where did you receive the phone call?

A. In my office.

Q. At Universal Studio? A. That is right.

Q. Did you recognize his voice? A. Yes.

Q. Approximately how long after the conversation of on or about April 3rd was this second conversation?

A. It was two days later, on April 5th.

Q. Is that the conversation you referred to in your affidavit filed in this court as the conversation of April [58] 12th? A. Yes.

Q. In your affidavit did you give the entire conversation? Did you set forth the entire conversation in your affidavit of October 21st?

Mr. Roth: Objected to as immaterial and not cross examination.

(Testimony of Robert Speers)

Mr. Cooper: You can anticipate cross examination by asking the witness if he has been convicted of an offense, and in that way soften the blow, so to speak.

The Court: I will let him proceed.

Q. By Mr. Cooper: In your affidavit of October 21st, did you give the entire conversation, relate the entire conversation? A. No, I did not.

Q. Did you at some time prior to the preparation of your affidavit and some time after this conversation of April 5th make a memorandum of that conversation?

A. Yes, I did.

Q. In what form was that memorandum?

A. Well, it was a memorandum to Mr. Muhl, which I dictated to my secretary.

Q. Did you sign it? A. Yes.

Q. When did you dictate that memorandum?

A. I checked the matter, and it was on July 2nd. [59]

Q. That you dictated this memorandum?

A. Yes.

Q. And in that memorandum did you make the same mistake with reference to the dates?

A. Yes, I did.

Q. Being April 10th and April 12th?

A. That is right.

Q. Have you used that memorandum to refresh your recollection as to the entire conversation that took place on or about April 5th? A. Yes, I have.

Q. Will you relate the entire conversation that you had with Robert Cummings on or about April 5, 1943?

Mr. Roth: If the court please, we object to that on the ground that it is apparent from the questions of counsel

(Testimony of Robert Speers)

and the answers of the witness thereto, that he is about to give a conversation based upon refreshing his recollection from a memorandum made three months after the conversation took place.

Mr. Cooper: May I ask a further question?

The Court: Yes.

Q. By Mr. Cooper: At the time you dictated this memorandum were the facts fresh in your memory? Did you have an independent recollection?

A. Reasonably, yes; it was reasonably fresh in my memory. [60]

The Court: I am inclined to permit interrogation by opposing counsel at this time, to inquire further as to the reasonableness of the statement to the effect that the witness had the matter approximately accurately in his mind.

Mr. Cooper: May I state, Mr. Roth, that I have that memorandum, should you care to refer to it.

Mr. Roth: May we have the permission of the court to look at it before—

The Court: Yes.

Mr. Cooper: Here is the file.

Mr. Roth: Yes. May I rise? It is hard to see the witness from there, your Honor.

The Court: Yes; that is all right.

Mr. Cooper: Pardon me. Is it improper to rise in the court? I have done that myself.

The Court: There is a physical difficulty when one is sitting so far away from the witness, because of the obstruction which is created by this device here.

(Testimony of Robert Speers)

Mr. Cooper: My point is, I have risen to question the witness myself, which I do as a matter of habit. Maybe the court would prefer that I sit.

The Court: Sometimes it is disturbing, on cross examination, to the witness.

Cross-Examination

Q. By Mr. Roth: Mr. Speers, at the time you made this memorandum which I have in my hand, and to which you have [61] referred in your direct examination, did you have any pencil notes from which you made it?

A. No, I did not.

Q. Then you made the memo entirely from memory?

A. With the aid of questions that I asked my secretary as to approximately when Mr. Cummings came in, and I believe I asked her if she had any recollection of him calling and making an appointment, and she said she had; but mostly from memory, from my recollection of the conversation.

Q. Do you keep in your office any data which shows the times and dates upon which telephone calls are made?

A. Not a permanent record, no, but she often makes notations on her daily calendar of an appointment which will be coming up in a day or so.

Q. When you spoke to your secretary did she submit to your inspection any data that she had made of a telephone conversation?

A. To the best of my knowledge, she did not. She merely said that she recalled Robert Cummings calling me.

Q. Did you ask her on what date the call came in?

A. Yes, I did.

(Testimony of Robert Speers)

Q. What did she say to you?

A. I don't recall.

Q. What else did you ask your secretary before you dictated this memorandum to which you have alluded?

A. The only other question I can recall asking was [62] along the same general lines, asking her if she recalled Mr. Cummings coming in one day and calling me a day or two thereafter.

Q. What did she say?

A. She said that she did.

Q. You have referred to this memorandum as having been made on July 2nd.

A. That is right.

Q. Is there any date on the memorandum itself which indicates that it was made at that time?

A. There doesn't seem to be.

Q. How do you know that it was made on July 2nd?

A. Because my secretary consulted her stenographic notebook, which carried the notation as to when the dictation was taken.

Q. Then you are testifying not only from your memory, but from your secretary's memory and notes?

A. That is correct.

Q. You referred in your direct examination this morning to certain data that you had referred to in order to straighten out your error as to dates?

A. Yes.

Q. Where is that data?

A. I don't know where it is physically at the moment, but it was at that time—

(Testimony of Robert Speers)

Mr. Cooper: He wasn't sure without consulting the file [63] that I just handed Mr. Roth. I direct your attention, Mr. Roth, to a letter in the file.

Q. By Mr. Roth: Your counsel has directed my attention to a letter dated April 9, 1943, on the stationery of Universal Pictures Company, Inc. It is an unsigned letter, and appears to be addressed to Mr. Robert Cummings, care of Oscar R. Cummins, Esq., California Bank Building, Beverly Hills, California. Is that the data you referred to this morning from which you refreshed your recollection, and upon which you changed the date set forth in the affidavit? A. It is.

Q. Is that the only data you referred to?

A. No. I checked on the date of the telegrams sent Mr. Cummings.

Q. Did you have a record of the date of those telegrams in your office?

A. I did not, in my office, no.

Q. Where did you find that record?

A. In the contract files.

Q. Who asked you to make this check?

A. Edward Muhl.

Q. When did the request come to you to make this check?

A. Approximately two or three weeks ago.

Q. Then when did you dictate this memorandum which I showed you, and which you have testified was dictated on July 2nd? [64]

A. I dictated it on July 2nd.

(Testimony of Robert Speers)

Q. Did you dictate the memorandum before the request was made upon you to give a report on the conversation?

A. Oh, no. The request for the memorandum to which you refer, of July 2nd, was made by Edward Muhl prior to July 2nd.

Q. When?

A. I would imagine, although I don't remember exactly, that it was within two or three weeks after April 2nd or 3rd, the time Robert Cummings did not report.

Q. So that there will be no confusion on that subject, the notices apparently fixed the date for his reporting as April 12th?

A. Yes.

Q. Do you mean two or three weeks after April 12th?

A. Yes, I do.

Q. Two or three weeks after April 12th would bring you to the early part of May, so the request from Mr. Muhl to make a memorandum of your conversation came to you the early part of May?

A. That is right.

Q. But you didn't make the memorandum until July 2nd?

A. That is correct.

Q. What did you do between the early part of May and July 2nd, the date upon which you testify you dictated this memorandum? [65]

A. That is the point. I did a great many things. I was busy and forgot about the memorandum, and Mr. Muhl would remind me of it, and I would say that I was going to do it, and then didn't do it. It was dilatory on my part.

(Testimony of Robert Speers)

Q. When you finally got down to getting the data for the memorandum which you dictated, what did you do in respect of getting the data for that memorandum?

A. As I stated, I searched my own mind as to the facts, and talked to my secretary as to her recollection about Mr. Cummings' visit and telephone call.

Q. Did you do anything else?

A. No, I don't believe I did. I don't recall doing anything else.

Q. Is there anything that appears on the memorandum itself to which your counsel has referred which indicates that that was written on July 2nd?

Mr. Cooper: I will stipulate that there is not, counsel.

Q. By Mr. Roth: Did you, at the time you had the first conversation with Mr. Cummings, which you now fix as April 3rd, make any pencil memorandum of what was said between the two of you? A. No.

The Court: Did you make any notes of any kind?

A. No.

Q. By Mr. Roth: Did you dictate to your secretary, or to anyone in your office, anything as to what occurred between [66] you? A. No, I did not.

Q. And other than looking at this letter, to which I have directed your attention, which is dated April 9, 1943, was there any other data that you had before you upon which you based the summary of the conversation as set forth in the memorandum that you testify you prepared on July 2nd?

A. I am sorry. I didn't follow the question.

Q. Perhaps it is too involved. I will reframe it. When you dictated the memorandum which you testify was dictated on July 2nd, 1943, did you have before you

(Testimony of Robert Speers)

any memorandum or data of any kind other than this letter, unsigned, which is dated April 9, 1943, and to which I have already directed your attention?

A. Is it proper for me to—I did not mean to say that I consulted this letter at the time I dictated the memorandum, because I did not.

Q. You mean the memorandum of July 2nd?

A. Yes. I consulted the letter after I had written the memorandum, fairly recently, two or three weeks ago.

The Court: That is the letter of April 9th?

A. That is right.

Q. By Mr. Roth: Either I am confused, or counsel or the witness is confused, because I asked you that question, and counsel then handed me the file and turned to the letter of April 9th, and stated that that was the data to which you [67] referred. That is wrong, is it?

A. Yes, it is. I referred to data, but not at the time I wrote this memorandum, or I wouldn't have put—

Q. Then, as a matter of fact, at the time of the conversation that you had with your secretary, when you dictated the memorandum, that you say was dictated on July 2nd, 1943, you had no data or memorandum before you?

A. That is correct.

The Court: Unless counsel wishes to pursue the matter for some other reason, I am inclined to think the objection is well taken.

Mr. Cooper: May I ask a couple of other questions?

The Court: Yes.

(Testimony of Robert Speers)

Redirect Examination

Q. By Mr. Cooper: When you dictated the memorandum or letter of July 2nd, were the facts of the phone conversation fresh in your mind?

A. Yes, they were.

Q. And you set them forth and dictated that to your stenographer?

A. That is right.

Q. The things you consulted your secretary about, I understood from your answers, were with respect to dates?

A. Yes.

Q. At the present time do you have a general recollection of the general conversation of April 5th? [68]

A. I do.

Q. Have you also refreshed your memory as to the conversation, as to the specific details, from the memorandum of July 2nd?

A. I have.

Mr. Roth: If the court please, there is nothing we could do or would want to do to prevent this witness from testifying to any conversation he had with the plaintiff, Robert Cummings, on April 5th. The sole point of our objection is that the witness must testify from his recollection, and not from any purported memoranda that he made of that conversation later.

The Court: That is the purpose of the ruling.

Mr. Roth: Yes. Now, of course, after the witness has already testified that he has refreshed his recollection, there is no way of differentiating between whether he is testifying to it from his original recollection of the conversation, or from his recollection of the conversation, plus such assistance as he may have obtained from reading and dictating and re-reading this memorandum, but we haven't any objection to the question being asked and

(Testimony of Robert Speers)

answered, insofar as it is possible for the witness to answer it from his own recollection. The memo is not admissible.

Q. By Mr. Cooper: Will you relate the conversation you had with Mr. Cummings on April 5th?

A. Mr. Cummings called me on the telephone at my office [69] on that date, and, referring to our previous conversation in my office, said that he had thought over the matter which we had discussed, which was whether or not he would appear in the part of "Hank" in the picture "Fired Wife," and said that he had thought it over very seriously, and had come to the conclusion, rather reluctantly, that he would not do the picture. I said that in view of our long conversation before, in which we had gone into all the details and all the arguments both ways, that I considered that there was no point at this stage of the game in my trying to rehash those arguments again, and that if that was his final decision there wasn't much that I could do about it. And he said that was the case, that he had thought it over very seriously, and had finally come to that definite conclusion, that he would not do the picture, because he didn't think it was right for him to do it, and that, furthermore, he had decided that he would devote one hundred percent of his time to the war effort, and had signed up for the duration. And he stated further that he supposed that everyone at the studio would think he was a son-of-a-bitch for coming to that conclusion, and, if so, he was sorry, and he hoped that I personally wouldn't feel that way about it. And I think that ended the conversation.

Q. Now going back again to the question of fixing the date, do you recall an occasion some three or four

(Testimony of Robert Speers)

weeks ago when Mr. Cooper, your present counsel, came to see you? [70] A. Yes, I do.

Q. And whether you notified Ed Muhl, and at which conversation Ed Muhl and Ben Erlich were also present?

Mr. Roth: We object to counsel testifying. He has asked many leading questions, and he is testifying, in effect, now. It is not a matter of proper direct examination.

The Court: May I ask the reporter to read the question?

(Question read by the reporter.)

The Court: What is the purpose of the present line of interrogation?

Mr. Cooper: It was not proper on voir dire, may it please the court, but I want to show the circumstances under which it was called to his attention.

The Court: You mean the error as to the dates?

Mr. Cooper: That is correct. Of course, ordinarily these matters would be first developed on cross examination, and then further inquired into on redirect, but here we have a somewhat unusual situation, where the witness has signed an affidavit, in which he has sworn to assertions which are now part of his direct examination, and, anticipating that the statements made in the affidavit would confront him, he is endeavoring now to give his explanation of how those mistakes arose. I think he should be allowed to do that.

Q. By Mr. Cooper: Did someone in that conversation call your attention to a question of dates? [71]

A. Yes.

Q. Who was that someone? A. You.

(Testimony of Robert Speers)

Q. Was it then that you began this check which you have heretofore testified to, with respect to dates?

A. Yes, it was.

Q. Following this conversation on or about April 5th, did you convey the information that you had obtained from Mr. Cummings to someone in the studio?

A. Yes, I did.

Q. To whom?

Mr. Roth: We object to that as immaterial. The time and date are long after the notice of May 29th.

The Court: This apparently seeks to throw light on how the error in dates was ascertained and sought to be corrected.

Mr. Cooper: No, your Honor. This now is to show the knowledge of the officers of the corporation and the matters upon which they based their telegram of April 10th.

The Court: May we have the pending question?

(Question read by the reporter.)

Mr. Roth: That is objected to.

The Court: It would appear that in the performance of his duties the witness might well communicate with others in the studio who had some duty to discharge with reference to this contract.

Mr. Cooper: That is the sole purpose. [72]

The Court: I think he should be allowed to answer.

Q. By Mr. Cooper: To whom did you convey that information? A. Dan Kelley.

(Testimony of Robert Speers)

Q. To whom else? A. To—

Q. You identified Dan Kelley earlier in the examination, I believe?

A. Yes. To Emmett Ward.

Q. In what department is Emmett Ward?

A. The contract department.

Q. Do you recall how soon thereafter?

A. Immediately after concluding my telephone conversation with Mr. Cummings, I went into Mr. Kelley's office and told him of the conversation.

Q. Did you tell him the entire conversation?

A. Yes.

Q. Thereafter, and on or about the 10th of April, did you have some telegrams on your desk?

A. Yes.

Mr. Cooper: At this point, may it please the court, with the permission of the court and counsel, I would like to call a representative of the Western Union Telegraph Company, who has the telegrams, so that I can show them to the witness.

The Court: You merely want to temporarily withdraw the witness?

Mr. Cooper: Yes, if your Honor please. Any objection? [73]

Mr. Roth: None at all.

Mr. Cooper: Mr. Meaney, will you please come forward.

J. E. MEANEY,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please, for the record.

A. J. E. Meaney.

Direct Examination

Q. By Mr. Cooper: Mr. Meaney, what is your business or occupation?

A. Commercial manager of the Western Union Telegraph Company.

Q. Pursuant to a subpoena, have you brought with you certain telegrams? A. I have.

Q. Three in number? A. Yes.

Q. Dated April 10, 1943? A. They are.

Q. Each addressed to Robert Cummings at different addresses? A. They are.

Q. Will you hand me those telegrams, please?

A. Yes.

Mr. Cooper: I first show the telegrams to counsel. [74]

Mr. Roth: Thank you.

Q. By Mr. Cooper: Were those telegrams left at the Western Union Telegraph Company office in the County of Los Angeles? A. They were.

Q. On what day? A. April 10, 1943.

Mr. Roth: Pardon me. May I ask the witness whether he is testifying from recollection or from notes.

A. I am testifying from the telegrams.

Mr. Roth: All right.

Q. By Mr. Cooper: Does the Universal Pictures Corporation have an arrangement for credit with the Western Union? A. They have.

Mr. Cooper: You may cross examine.

Mr. Roth: I have no questions.

Mr. Cooper: That is all. At this time I offer the telegrams in evidence as Defendant's Exhibit B for identification only, at the moment. Thank you, Mr. Meaney.

The Court: Is there any purpose in giving the three telegrams more than one designation?

Mr. Cooper: I know of none, no. They are identical in the message. The addresses are different, may it please the court.

The Court: They will become Defendant's Exhibit B.

[DEFENDANT'S EXHIBIT NO. "B"]

[WESTERN UNION TELEGRAM]

1943 APR 10 PM 6 17

APRIL 10, 1943

MR. ROBERT CUMMINGS (Report Dly)

14111 SHERMAN WAY

VAN NUYS, CALIFORNIA

YOU ARE HEREBY INSTRUCTED TO REPORT TO US AT OUR STUDIO AT UNIVERSAL CITY, CALIFORNIA, AT THE OFFICE OF MR. DAN KELLEY, AT TEN O'CLOCK MONDAY MORNING, APRIL 12, 1943, FOR THE RENDITION OF YOUR SERVICES UNDER YOUR CONTRACT OF EMPLOYMENT WITH US DATED NOVEMBER 21, 1938, AS HERETOFORE AMENDED AND EXTENDED, IN CONNECTION WITH THE PORTRAYAL OF A ROLE IN OUR PHOTOPLAY NOW ENTITLED "FIRED WIFE" AND/OR THE RENDITION OF SUCH OTHER SERVICES AS WE MAY REQUIRE UNDER SAID CONTRACT, AS AMENDED AND EXTENDED.

UNIVERSAL PICTURES COMPANY, INC.

By EDWARD MUHL

ASSISTANT SECRETARY [244]

(Defendant's Exhibit B)

1943 APR 10 PM 6 11

APRIL 10, 1943

MR. ROBERT CUMMINGS (Report Dely)
CARE OSCAR CUMMINS
527 CALIFORNIA BANK BUILDING
BEVERLY HILLS, CALIFORNIA

YOU ARE HEREBY INSTRUCTED TO REPORT TO US AT OUR STUDIO AT UNIVERSAL CITY, CALIFORNIA, AT THE OFFICE OF MR. DAN KELLEY, AT TEN O'CLOCK MONDAY MORNING, APRIL 12, 1943, FOR THE RENDITION OF YOUR SERVICES UNDER YOUR CONTRACT OF EMPLOYMENT WITH US DATED NOVEMBER 21, 1938, AS HERETOFORE AMENDED AND EXTENDED; IN CONNECTION WITH THE PORTRAYAL OF A ROLE IN OUR PHOTOPLAY NOW ENTITLED "FIRED WIFE" AND/OR THE RENDITION OF SUCH OTHER SERVICES AS WE MAY REQUIRE UNDER SAID CONTRACT, AS AMENDED AND EXTENDED.

UNIVERSAL PICTURES COMPANY, INC.

BY EDWARD MUHL

ASSISTANT SECRETARY

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Defendant's Exhibit No. "B" for Identification. Date: Jan. 4, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk.
[245]

Mr. Cooper: Mr. Speers, please. [75]

ROBERT SPEERS

(Recalled.)

Redirect Examination

(Continued.)

Q. By Mr. Cooper: Now, on April 10, 1943, did you have before you these three telegrams, Defendant's Exhibit B for identification?

A. Yes, I did. My handwriting is on the bottom of one of them.

Q. Those identical telegrams? A. Yes.

Q. Did someone at the studio leave those telegrams with you? A. Yes.

Q. Who left those telegrams with you?

A. Emmett Ward.

Q. He is a member of the contract department?

A. That is right.

Q. Did you hold those telegrams on your desk for some period of time on April 10, 1943?

A. Yes, I did.

Q. For how long a period of time?

A. I think it was about three hours or four hours.

Q. Until what time of that afternoon?

A. My recollection is that it was 4:30 or 5:00 o'clock.

Q. And were you waiting for some reason?

A. Yes.

Q. Waiting for what? [76]

A. I had reason to think, to hope that either Robert Cummings or Oscar Cummins would call me, saying that the—

(Testimony of Robert Speers)

Q. Never mind that. You didn't hear from them?

A. That is right.

Q. Did you deliver those telegrams to someone?

A. Yes.

Q. To whom did you deliver the telegrams?

A. To my secretary, Miss Clay.

Q. Who is seated here in the courtroom?

A. That is right.

Q. Before April 3, 1943, had you seen Robert Cummings in the uniform of the Civilian Air Patrol?

A. Yes, I had.

Mr. Cooper: You may cross examine.

Recross-Examination

Q. By Mr. Roth: Mr. Speers, how long had it been prior to April 3rd that you had seen Mr. Cummings in the uniform of the Civilian Air Patrol?

A. You mean how long a period had I seen him in it, or how long before that?

Q. I mean how long a period prior to that time.

A. I think it was about four or five months before.

Q. You knew for a period of at least four or five months in 1943, that Mr. Cummings was in the Civilian Air Patrol? A. Yes.

Q. And you knew also that the fact that he was in the [77] Civilian Air Patrol wouldn't interfere with his duties at Universal, didn't you? A. Yes, sir.

Q. On April 3, 1943, when you had your first conversation with Mr. Cummings, when you finished that conversation did you call on Mr. Dan Kelley and tell him about the conversation?

A. That is the 2nd or 3rd?

(Testimony of Robert Speers)

Q. Yes. A. I believe I did.

Q. Did you call on Mr. Ed. Muhl and tell him about the conversation?

A. I don't recall that, although I may have.

Q. Did you call on Mr. Ward after that first conversation and tell him about the conversation?

A. I don't recall talking to him about it either.

Q. The only one you recall talking to about the conversation of April 3rd was Mr. Dan Kelley?

A. That is right, the first conversation.

Q. When you had the second conversation, that is, the one over the telephone, did you again call on Mr. Kelley and tell him about the conversation?

A. Yes, I did.

Q. Did you call on Mr. Muhl and tell him about the conversation?

A. No. Mr. Kelley, in his office, tried to get Mr. [78] Muhl on the telephone, and instead got Mr. Ward, who came into the office, at which time I told him of my conversation with Mr. Cummings.

The Court: May I interrupt. When you say "Mr. Cummings," because of the similarity in names, I suggest that you indicate whether you are referring to Mr. Robert Cummings or to Mr. Oscar Cummins.

A. Mr. Robert Cummings, in this case.

Q. By Mr. Roth: After your conversation with Dan Kelley on April 5th, I understand that Mr. Ward was called in and appeared? A. Yes.

Q. And when he appeared did you repeat to Mr. Ward what you had already told Mr. Kelley?

A. Yes, I did.

(Testimony of Robert Speers)

Q. So the only two people you spoke to about the conversation you had with Mr. Cummings were with Mr. Kelley on the 3rd, after the first conversation, and with Mr. Kelley and Mr. Ward on the 5th?

A. Those were the only people I spoke to within five minutes after I finished that conversation. I subsequently spoke to a number of people.

Q. Who were they?

A. I discussed the matter with Mr. Muhl. I discussed it with my associate in my office, Miss Elrod. I discussed it with my wife. I discussed it with Mr. Jack Gross. I [79] discussed it with Mr. Ernest Fesser, or Mr. Mike Fesser, and with Mr. Ernest Pagano, the writers on the picture, and I discussed it with Mr. Lamont, the director of the picture, and John Joseph, the publicity director of the studio, and, I am sure, with a number of other people, whose names escape me at the moment.

The Court: It is not clear to me, when you use the expression "I discussed it," whether you are referring to the first conversation, had on April 3rd at the studio with the plaintiff, or the later conversation over the telephone on April 5th.

A. As a practical matter, your Honor, in all these discussions I am sure I referred to both conversations, but specifically I was referring to the second conversation of April 5th, in which Mr. Cummings said that he had decided not to do the picture, Mr. Robert Cummings.

Q. By Mr. Roth: Are all the people whose names you have mentioned, other than your wife, people who were employed by the defendant Universal, and who were in some way connected with the picture "Fired Wife"?

A. Yes, either directly or indirectly connected with it.

(Testimony of Robert Speers)

Q. I have a copy—it may be a duplicate original, Mr. Speers—of the affidavit which you signed on the 21st day of October, 1943. Will you look at the last page and tell me whether or not that is your signature?

A. Yes, that is my signature. [80]

Q. When you signed this affidavit who asked you for the facts upon which the affidavit is based?

A. Mr. Ben Erlich.

Q. When Mr. Ben Erlich asked you for those facts was anyone else present?

A. I believe not.

Q. You knew at the time you gave the facts to Mr. Erlich upon which this affidavit is predicated—and I am referring to the affidavit which is dated October 21, 1943—you knew that there was a lawsuit pending, did you not, between Robert Cummings and Universal Pictures Company, Inc.?

A. I believe I did, although I don't know that anyone specifically said it was pending. It was a matter of common knowledge that there was a likelihood of a lawsuit, that in all probability there would be one, but I can't say honestly that I had any official knowledge of the existence of a lawsuit. I assumed that there was one.

Q. Could you say that you had positive knowledge that there was one?

A. No, I don't believe I can.

Q. Mr. Speers, don't you read the affidavits you sign?

A. Yes, sir.

Q. Let me call your attention to the caption of the affidavit, which is entitled In The United States District Court, in the action of Robert Cummings vs. Universal Pictures Company, Inc. Didn't that indicate to you or

(Testimony of Robert Speers)

give you [81] positive knowledge that there was a lawsuit pending?

Mr. Cooper: That is calling for a conclusion of the witness. I don't want to quibble, but the witness said he assumed there was one. The mere fact that it was entitled in the court and cause might not indicate that the suit had already been filed.

Mr. Roth: That is quite possible. This is a question of credibility and a question of what the witness was doing at the time he made the affidavit, because the question of credibility is oftentimes a close one, and I think it is fair to go into the witness' exact knowledge.

Mr. Cooper: I have no objection to that, may it please the court.

The Court: I think the form of the question needs to be revised.

Q. By Mr. Roth: At the time you signed the affidavit, Mr. Speers, did you read the first page thereof?

A. Yes, I did.

Q. And you noticed that it was entitled In The District Court of the United States, Southern District of California, in the case of Robert Cummings vs. Universal Pictures Company, Inc.?

A. Yes.

Q. Did you know at that time that Universal was asking for a temporary restraining order to prevent Robert Cummings from appearing on the radio for the Lux Theatre of the Air? [82]

A. I am sure that I did, and it was a matter of knowledge to me. I can't swear on the stand that at that moment I knew it. It was explained to me by Mr. Erlich at one time or another. Whether it was at that precise time I am not sure.

(Testimony of Robert Speers)

Q. At the time you made your statement to Mr. Erlich you wanted to state to Mr. Erlich all the facts that you had any knowledge about as to your conversation with Mr. Cummings, didn't you? A. Yes.

Q. You knew at the time when you were talking to Mr. Erlich, at the time this affidavit was signed, October 21, 1943, that you had already dictated the memorandum which you testified was dictated on July 2, 1943, didn't you? A. That is right.

Q. Why didn't you refer to that memorandum before you signed this affidavit?

A. I don't know. I didn't.

Q. Is there anything in this affidavit, Mr. Speers, any averment, any suggestion, any statement, in which you say that on April 5th, when Robert Cummings called you back over the telephone, he told you substantially or in effect that he had decided to devote one hundred percent of his time to the war effort and had signed up for the duration? Is there anything in that affidavit, substantially or in effect, which contains that statement? [83]

A. I note here a sentence that says also that he was thinking of signing up for service for the duration of the war.

Q. I direct your attention, Mr. Speers, to the fact that that sentence refers to a conversation that you had on April 10th. I will read it to you: "On April 10, 1943, at Universal City, California, in a conversation with Cummings in my office, Cummings told me that he was considering refusing to render his services in said photoplay for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the

(Testimony of Robert Speers)

Service for the duration of the war." I understand you corrected the date in that affidavit from October 10th to October 3rd.

Mr. Cooper: You don't mean October.

Q. By Mr. Roth: I mean April 10th to April 3rd?

A. That is right.

Q. So the conversation to which that subject matter refers is in reality the conversation that took place on April 3rd? A. That is right.

Q. Is there anything in that affidavit which refers to a conversation on April 12th, which you have now corrected to April 5th, in which you say, substantially or in effect, that Mr. Cummings called you up and told you that he had decided not to do the picture, because he had made up his [83] mind that he was going to devote one hundred percent of his time to the war effort, and was going to sign up for the duration of the war?

A. That is a reference to the conversation—

Q. You may read it.

A. It says: "On April 12, 1943, I had a telephone conversation with Cummings relative to the same subject matter as is hereinabove set forth, and Cummings stated to me that he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role herein referred to. Cummings did refuse to report and did not appear to render the said services for the role assigned

(Testimony of Robert Speers)

him, and it therefore became necessary to assign another actor to replace Cummings and this was done. Cummings has failed and refused, and continues to fail and refuse, to report for work at the studios of Universal."

Q. Now, Mr. Speers, you testified that when you gave the data for that affidavit to Mr. Erlich, you didn't refer to the memorandum which you testified was dictated on July 2nd, but you have also testified that after you had this conversation with Mr. Robert Cummings on April 3rd, and after you had your conversation with Robert Cummings on April 5th, you repeated that conversation not only to Mr. Dan Kelley, and not only to Mr. Ward, but to at least half a dozen other people, whose names you have mentioned, so the [84] substance of that conversation was rather fresh in your mind, wasn't it?

A. Yes, reasonably so.

Q. Would you say that you made a fair statement of the context and substance of that conversation when you signed that affidavit?

A. Apparently I overlooked a detail involving Robert Cummings; I overlooked part of the conversation in making the affidavit, in which Robert Cummings told me that he had signed up for the duration of the war and was going to devote one hundred percent of his time to the war effort.

Q. Do you call that a detail? A. Yes.

Q. It was a sufficiently important detail, wasn't it, Mr. Speers, for the legal department of Universal to

(Testimony of Robert Speers)

frame a notice predicated upon that alleged statement, which they never sent? Isn't that true?

Mr. Cooper: I object, your Honor.

The Court: That is arguing with the witness.

Mr. Cooper: I will withdraw it, however, if the court will permit me to go into it.

The Court: I am inclined to think that we had better let the lawyers argue the law, rather than have the witnesses argue it.

Mr. Roth: All right, your Honor. I am going to be bound by the court's ruling. That is all. [85]

Redirect Examination

Q. By Mr. Cooper: Incidentally, some time after April 5th did you, in fact, obtain somebody else to portray the role of "Hank"? A. Yes, we did.

Mr. Roth: Is that part of the redirect examination?

Mr. Cooper: That may be true, counsel.

The Court: I will let him answer it.

Mr. Cooper: This may not be, technically, redirect, but I ask permission to reopen for this question.

Q. By Mr. Cooper: On April 10th when you sent or caused to be sent the telegrams of April 10th, did you have any conversation with Robert Cummings on that day? A. No, I did not.

Mr. Cooper: I think that is all.

Mr. Roth: That is all. No further questions.

Mr. Cooper: Miss Clay. [86]

JOSEPHINE CLAY,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

A. Miss Josephine Clay.

Direct Examination

Q. By Mr. Cooper: Miss Clay, what is your business or occupation?

A. Secretary to Mr. Speers.

Q. You are employed by Universal Pictures Company, Inc.?

A. That is right.

Q. And you have been engaged in that capacity for approximately how long?

A. Well, with Mr. Speers about a year.

Q. And with Universal for how long?

A. Two years.

Q. Were you at Universal Studio on April 10, 1943?

A. I was.

Q. Did you have occasion on that day to receive some telegrams from Bob Speers?

A. Yes, I did.

Q. I show you Defendant's Exhibit No. B, being three telegrams in number, and ask you if you recognize those as telegrams, in form and in substance, that you received from him at that time.

A. That is right. They are. [87]

Q. Did you receive some instructions from him at that time, from Mr. Speers?

A. Yes.

Q. What instructions did you receive from him?

A. We were to wait until 5:30 in the afternoon for a phone call from Mr. Oscar Cummins, and when we didn't receive the phone call—

Mr. Roth: I move that that be stricken.

(Testimony of Josephine Clay)

The Court: Let the answer go out.

Mr. Cooper: I will withdraw that.

Q. By Mr. Cooper: Did he instruct you to deliver the telegrams somewhere?

A. Yes, to the Western Union office on my way home.

Q. Do you have a teletype machine at Universal?

A. Yes.

Q. Which teletypes the messages you give to the Western Union? A. Yes.

Q. Was the girl who operated that teletype machine there that Saturday afternoon? A. No.

Q. Did you take those three telegrams, Defendant's Exhibit B for identification, somewhere?

A. Yes, I did.

Q. Where did you deliver them?

A. At the Beverly Hills office of the Western Union.
[88]

Q. And you left them there with the agent at Western Union Telegraph Company at that place? A. Yes.

Mr. Cooper: You may cross examine.

Mr. Roth: No questions.

Mr. Cooper: I now at this time offer the telegrams in evidence, may it please the court, as Defendant's Exhibit B.

Mr. Roth: To which we object, your Honor, on the ground that no proper foundation has been laid. All the evidence shows is that the telegrams were composed and delivered by some agent of Universal to the telegraph office. There is no evidence whatsoever that the tele-

grams were ever transmitted or delivered to the plaintiff or his agent.

Mr. Cooper: We are relying, if your Honor please, upon the presumption of delivery, and the paragraph in the contract, which is made a part of the complaint, which reads as follows: Paragraph 15 of the contract provides: "All notices which the producer is required or may desire to serve upon the artist under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist."

And, eliminating some of the immaterial provisions of the paragraph:

"In any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the [89] same so addressed by telegraph or cable, or, at its option, the producer may deliver the same to the artist personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

Then I also call your Honor's attention to the case of *Union Construction Co. vs. Western Union Telegraph Company*, 163 California, 298, at page 306, and also the case of *Eppinger vs. Scott*, 112 Cal. 369, at page 371, referred to in our memorandum of points and authorities.

The Court: Those cases hold that an inference is deductible?

Mr. Cooper: It is a rebuttable presumption, I believe.

The Court: What is the page in your memorandum?

Mr. Cooper: Pages 30 and 31, may it please the court, but I particularly am resting on the provisions of the contract.

Mr. Roth: All the provisions of the contract do, those provisions read by Mr. Cooper, they say this, that the date of delivery to the telegraph office shall be the date of the notice, shall be the date of the service of the notice. The date of the service of the notice—that doesn't mean that it is the date of the receipt of the notice. It means [90] this, that if the plaintiff got the notice five days after that date, the date of service would be the date of the delivery to the telegraph office.

Mr. Cooper: That is not my conception of it.

Mr. Roth: That is our argument on it.

Mr. Cooper: That will be for the court to determine.

Mr. Roth: They had an official from the Western Union on the stand. All these people testified to was that they received those wires in their office on that date, the date the wires bear. The officer didn't testify that those wires were transmitted by hand or by telephone or in any other way.

The Court: In the first of the two cases cited by defense counsel, namely, *Union Construction Co. vs. Western Union Telegraph Company*, 163 Cal. 298, the quotation from page 306 includes the following

statement, on page 31, beginning about line 19 of the brief:

“If a letter or telegram is duly addressed, prepaid and delivered in the post-office receptacle or to the telegraph company, there is a disputable presumption of fact, arising from the almost invariable result, that it has been transmitted and delivered in regular course to the person addressed.” Citing *Eppinger v. Scott*; Code of Civil Procedure, Section 1963, subdivision 24, and several textbooks on evidence.

Then the quotation from the decision in *Eppinger v. Scott*, reported in 112 Cal. 369, the quotation being found at pages 371 and 372 of the decision, states: “The rule has long [91] been settled and is made statutory in this State (Code Civ. Proc., sec. 1963, subd. 24), ‘that a letter duly directed and mailed was received in the regular course of the mail.’ The same rule has been extended to telegrams.”

Then follow a number of citations. Wouldn't you agree that that would appear to fix the foundation to introduce these telegrams in evidence?

Mr. Roth: I am inclined to think so, your Honor, but I would like to make this further point. If it is a presumption that attaches, then I think the official of the telegraph company who testified should be retained here, because I will want to ask him whether they were actually delivered, and, if delivered, whether delivered by hand or telephone, if he knows, because, in respect to a notice of this kind, the question now is as to whether these messages were delivered physically or phoned in. I would like to know.

Mr. Cooper: If your Honor please, I didn't excuse him. But I will be very happy to get him on the telephone.

Mr. Roth: Perhaps we can dispense with that, because at a prior discussion I had with counsel on this subject, I advised counsel that we have all the notices of Universal except these wires, and counsel informed me that he had, that as far as he was able to find out, the wires had been delivered to the telegraph office and phoned, one to Robert Cummings' residence in Van Nuys, and one to the office of [92] Oscar Cummins, at a certain address. If that is the fact, I am willing to stipulate to that fact.

Mr. Cooper: If your Honor please, I did phone counsel and notify him of that fact, and that was the reason I suggested this in my direct examination, figuring that counsel would desire to bring it out on cross examination. But it is a fact, rather than call this man— Will you please repeat your offered stipulation?

Mr. Roth: In lieu of recalling Mr. Meaney, I offer to stipulate at this time, not that it is a fact, but that Mr. Meaney would testify that the wires, which are Defendant's Exhibit B now for identification, were telephoned to the residence of Mr. Robert Cummings in Van Nuys, and to an address for Mr. Oscar Cummins some place in Los Angeles or Beverly Hills. I think you have the data.

Mr. Cooper: I have that data, counsel, and I certainly have no disposition to ask him to come back. I will be very happy to stipulate as to what the facts are.

Mr. Roth: With this further limitation, that the people who received those telephonic messages were neither Robert Cummings nor Oscar Cummins.

Mr. Cooper: I will accept the stipulation, based upon the information that I have in my files, from the telegraph company, which I assume is true.

Mr. Roth: We could do that at a recess.

Mr. Cooper: This might be a good time to take the [93] afternoon recess.

Mr. Roth: For that purpose, then, I am withdrawing my objection.

The Court: Very well, then. We will take a ten-minute recess.

(Short recess.)

Mr. Roth: If your Honor please, we now offer to stipulate that, in lieu of recalling Mr. Meaney from the Western Union for the purpose of cross examination, that, if recalled and cross examined, Mr. Meaney would testify that on April 12, 1943, by teletype, they sent a wire to Universal Pictures Company, Inc.—by “they” I mean Western Union Telegraph Company—to Edward Muhl, Assistant Secretary, which reads as follows: “YOUR TELEGRAM TO ROBERT CUMMINS (REPORT DLY) CARE OSCAR CUMMINS 527 CALIFORNIA BANK BLDG OUT OF CITY ADDRESS UNKNOWN WAS FONED TO HIS SISTERINLAW AT 1050 AM 11TH WHO WILL RELAY MSG TO HIM.”

Then the other one: “WIRE FILED BY MR EDWARD MUHL SECTY APR 10 TO ROBERT CUMMINGS CR OSCAR CUMMINS 527 CALIFORNIA BANK BLDG BEVERLYHILLS CALIF CLOSED UNTIL AM 8511 SUNSET BLVD CLOSED UNTIL AM 14111 SHERMAN WAY VANNUYS OUT OF CITY ADDRESS UNKNOWN WE FONED TO MRS OSCAR CUMMINS WHO WILL RELAY MESSAGE.”

And we offer in evidence as Plaintiff's Exhibit 1 this telegram.

[PLAINTIFF'S EXHIBIT NO. 1]

[WESTERN UNION TELEGRAM]

SJ126 35 DL COLLECT==BV BEVERLY HILLS
CALIF APR 12 1943 556P

UNIVERSAL PICTURES CO INC=

=EDWARD MUHL ASSISTANT SECRETARY=

:YOUR TELEGRAM TO ROBERT CUMMINS

(REPORT DLY) CARE OSCAR CUMMINS 527
CALIFORNIA BANK BLDG OUT OF CITY AD-
DRESS UNKNOWN WAS FONED TO HIS SIS-
TERINLAW AT 1050 AM 11TH WHO WILL RE-
LAY MSG TO HIM=

:WESTERN UNION TEL CO.

.609 PM. [235]

SB24 SVC=FAU=

:WIRE FILED BY MR EDWARD MUHL SECTY
APR 10 TO ROBERT CUMMINGS CR OSCAR
CUMMINS 527 CALIFORNIA BANK BLDG BEV-
ERLY HILLS CALIF CLASED UNTIL AM 8511
SUNSET BLVD CLOSED UNTIL AM 14111 SHER-
MAN WAY VAN NUYS OUT OF CITY ADDRESS
UNKNOWN WE FONED TO MRS OSCAR CUM-
MINS WHO WILL RELAY MESSAGE=

=LOSA APR 11 1943. (944 AM) ..

[Endorsed]: Case No. 3242-H-Civ. Cummings vs.
Universal. Pltf's. No. 1 in Evidence. Date: Jan. 4, 1944.
Clerk, U. S. District Court, Sou. Dist. of Calif. L.
Wayne Thomas, Deputy Clerk. [236]

Mr. Cooper: I have no objection to stipulating that [94] Mr. Meaney would so testify under cross examination, and, although I don't think the telegram should necessarily be admitted into evidence, I have no objection to it.

The Court: Very well.

Mr. Cooper: Call Mr. Kelley.

The Court: Just a moment before he takes the stand.

Mr. Cooper: Yes, your Honor.

The Court: Now, Mr. Reporter, will you read the stipulation?

(Stipulation read by the reporter.)

Mr. Cooper: The message was received at Universal on the teletype machine.

The Court: Received in the form of Plaintiff's Exhibit 1 at Universal.

Mr. Cooper: Yes, your Honor.

The Court: Now, the next witness.

Mr. Cooper: Daniel Kelley. [95]

DANIEL KELLEY,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name for the record.

A. Dan Kelley.

Direct Examination

Q. By Mr. Cooper: Mr. Kelley, what is your business or profession?

A. I am executive in charge of talent, writers, directors and producers, of Universal Pictures Company, Inc.

(Testimony of Daniel Kelley)

Q. And you were such during the months of April and May of this year? A. Yes, sir.

Q. And you have been such for approximately how long, Mr. Kelley?

A. I would say three or four years.

Q. Generally speaking, what are your duties?

A. In charge of creative talent.

Q. Do you know the plaintiff, Robert Cummings?

A. I do.

Q. And he, of course, is under contract with your studio? A. Yes, sir.

Q. And you had conversations with him from time to time?

Mr. Roth: Just a moment. That question should be answered yes or no, and it calls for a legal conclusion.
[96]

Mr. Cooper: I will withdraw it.

The Court: Let it go out.

Q. By Mr. Cooper: At least he was working there at your studio, wasn't he? A. He was.

Q. And portraying some parts in some photoplays?

A. Yes.

Q. Some time before the 10th day of April, 1943, the date these telegrams were sent, and between the 5th of April and the 10th of April, did Mr. Robert Speers, your casting director, report to you some information that he had received from Robert Cummings? A. Yes.

Q. What did he tell you?

Mr. Roth: Objected to as hearsay and self-serving.

Mr. Cooper: If your Honor please, it is not offered for the purpose of proving the truth of the conversations, but to show that the message was delivered to him, and that he acted upon it, and how he acted upon it.

(Testimony of Daniel Kelley)

The Court: I am inclined to think that, for the latter purpose, assuming that the evidence will ultimately show a chain of events supporting the allegations of the second amendment to the answer, that for such purpose this line of testimony appears to be admissible.

Mr. Roth: Without arguing the question, and even with that thought in mind, your Honor, for the witness merely to [97] testify that he had a conversation with Robert Speers, and merely on what subject matter, and what he did after that conversation—

The Court: I am inclined to think you are in error on that point.

Mr. Roth: I believe that it is entirely proper, may it please the court, for the purpose of showing what information he, as an executive of the studio, received, and how he relied and acted upon it. Will you do this, in order to simplify the thing, because I don't want to throw technical impediments in the way of the defense, that, subject to its being connected up, and subject to my objection that it is incompetent, irrelevant and immaterial and hearsay, that it may be received, and at some later stage in the proceeding, if not connected up, I may make a motion to strike?

The Court: Very well.

Q. By Mr. Cooper: What information did you receive from Bob Speers?

A. He came in and told me that Mr. Cummings had called him and told him that he was not going to play the leading part—that he had just had a telephone call from Mr. Cummings, and that he was not going to play "Hank" in the picture. He said, quoting Mr. Speers' words, "I know I am a no good son-of-a-bitch, but I can't help it. I signed up for the duration for exclusive services with the Civilian Air [98] Patrol, and I will not do the part."

(Testimony of Daniel Kelley)

Q. Did you call someone into your office at that time, or was someone called in?

A. I called for Eddie Muhl, I think. I called the Legal Department to find out what we could do.

Q. Do you recall who came in in response to your call to the Legal Department?

A. I am not definite. I don't know whether it was Eddie Muhl or Bud Ward.

Q. And was the conversation in substance repeated at that time? A. Yes.

Q. Did you suggest that they do something about it?

A. I did. I said I thought we should wire Mr. Cummings, to make it legal, and to find out whether it was definitely true that he was not going to be able to do any more pictures for the duration.

Q. Now, some time thereafter did you learn that wires had been sent?

A. Yes, I knew that wires had been sent.

Q. Had you seen the wires before they went out?

A. I did not. I don't think I did. I don't remember.

Q. For what purpose did you want Robert Cummings at your office on April 12, 1943?

A. I wanted to find out whether it was definitely true—

Mr. Roth: Objected to as an attempt to vary the terms [99] of a written instrument. There was a notice sent on April 10th which purports to set that up.

The Court: I think I should allow this.

Mr. Roth: I make the further objection, on the further ground that it is self-serving and is asking the witness to testify to something that was in his mind and was conveyed to nobody, and certainly not to this plaintiff.

(Testimony of Daniel Kelley)

The Court: While I would be inclined to say that testimony of this character is exceedingly weak, in other words, without corroboration, it could hardly be regarded as persuasive, I gather from some of the argument that has previously been urged here, that there may be a theory upon which the defendant is entitled to be heard respecting this particular aspect of the case. I am not altogether clear about that. However, while we have the witness on the stand I think we ought to hear this part of his story.

Q. By Mr. Cooper: For what purpose did you want Robert Cummings at your office on April 12th?

A. To find out personally from him whether it was objection to the part or whether it was definitely because of going into the Civil Air Patrol, and, if it was to go into the Civil Air Service, whether he, as had been stated to me, was going to be out for the duration and not able to do any more pictures.

Q. And you wanted to have such a discussion with him?

A. Yes, because I had been told that he was tied up [100] and doing no more pictures for the duration. That was what Mr. Speers came into my office and said, that he was not going to do that part. We were scheduled to start on Monday, and we had to postpone the picture until the following Thursday, to start, because we had nobody to go into it.

Q. Were you scheduled to start on April 12th?

A. That is correct, or whatever the date was. Whatever that Monday was, we didn't start until the following Thursday.

Mr. Roth: The 10th would be what?

A. We didn't start the picture until the 15th.

(Testimony of Daniel Kelley)

Q. By Mr. Cooper: Was it necessary for you, in making plans, to know with respect to his availability?

Mr. Roth: That is objected to as calling for the pure conclusion of the witness.

Mr. Cooper: I don't think so, if your Honor please.

The Court: As I understand it, there is no controversy raised as to the right of the defendant to substitute another player. This seems to be dealing with a matter about which there is no controversy.

Mr. Cooper: No, if your Honor please. This is with respect to the portion of the telegrams wherein they said, "You are asked to report for such other services as we may require."

The Court: Then may I have the pending question?

(Question read by the reporter.) [101]

The Court: Of course, that question is in the nature of a shortcut.

Mr. Cooper: That is right.

Mr. Roth: I will withdraw my former objection.

Mr. Cooper: I will ask this, then:

Q. By Mr. Cooper: In your wire of April 10th, you asked him to come in to portray the role of "Hank" and/or to perform such other services as you required?

A. Yes, sir.

Q. And had Robert Cummings come in to portray the role of "Hank," did you have any other services for him to perform at that time?

A. If he had come in to portray the role, no.

Q. Had he reported to you and said that he wouldn't portray the role of "Hank," for what other services did you want him at your office?

(Testimony of Daniel Kelley)

Mr. Roth: Objected to as having been asked and answered.

The Court: Was there any reason, in addition to what you have already told us?

A. Only that we would have to plan for some other personality for the rest of our pictures that we had figured for Mr. Cummings.

Q. By Mr. Cooper: Now, when Mr. Cummings did not appear on April 12th, what was your belief by virtue of, first, what you were told by Bob Speers and, second, his failure to report on April 12th? [102]

Mr. Roth: May I have that question, Mr. Reporter?
(Question read by the reporter.)

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial, and not proper direct examination, and self-serving, and calling for opinion evidence.

The Court: Yes; it calls for a state of mind. The witness, of course, can be asked as to what course of conduct he followed. It becomes a matter of inference in argument as to whether there was any connection between what was told him and the course of conduct the witness pursued or the others pursued in the studio.

Mr. Cooper: I will put it the other way, then.

The Court: In other words, while in a criminal case the accused may testify about the subject of what was in his mind, particularly in the field of intent, it is exceedingly rare that that is open to inquiry in a civil suit.

Mr. Cooper: Except this, may it please the court, that the state of mind of this soulless corporation, as counsel would say, could only act through its officers.

Mr. Roth: Soulless and mercenary.

Mr. Cooper: All right. That can only be shown through its agents and employees, acting within the scope

(Testimony of Daniel Kelley)

of their authority. What his state of mind was is important to the defense of estoppel, it seems to me—what the corporation was led to believe as a result of the conduct and the specific statements of Robert Cummings. [103]

The Court: It seems to me that there is some confusion here. The defense, naturally, would be allowed to testify as to the conditions prevailing as far as they pertained to this plaintiff, including plans that were either then completed or in process of formulation, and what, if anything, the company did, because if the matter rested purely in a state of mind I don't think it would constitute a defense.

Mr. Cooper: I think your Honor is correct in that, but I wanted to start with that and wind up with the other.

The Court: Well, a state of mind is in the nature of a conclusion, and perhaps a justification for a particular course of action being taken, or, on the other hand, omitted. So I think the pending question is open to the criticism raised.

Mr. Cooper: May I note an exception and make an offer of proof at this time, may it please the court? I will offer to prove by this witness, in response to the question asked, that he believed that Robert Cummings had intended to devote one hundred percent of his time to the Civil Air Patrol, and therefore would not perform any further services under his contract, and acted accordingly. That, in substance, would be the testimony of this witness in that regard, and I offer to prove that by the witness.

(Testimony of Daniel Kelley)

Mr. Roth: To which we object, upon the ground that it is incompetent, irrelevant and immaterial, and self-serving, and testimony as to a state of mind. [104]

The Court: The ruling is that the defense will be allowed to show the facts and circumstances and conditions, as far as they existed, with respect to the plaintiff, and what, if any, action was taken or action was omitted following the disclosure of the matters to which the witness either has testified or will testify.

Mr. Cooper: I will note an exception to the ruling and proceed. I take it that that is a denial of the offer of proof?

The Court: No. I think you have combined in your offer of proof some matters which are admissible and some which are not, and for that reason I make the ruling.

Mr. Cooper: Very well.

Q. By Mr. Cooper: Now, thereafter, that is, after April 12th, when Robert Cummings did not report at your office at the studio, what plans did you make with reference to Robert Cummings?

The Witness: Shall I answer?

The Court: Yes.

A. I took it for granted from that moment on, when he did not appear on April 12th, that he was definitely in the Civil Air Patrol for the duration.

Mr. Roth: I move that the answer be stricken, on the ground that it is not an answer to the question.

The Court: I think it should go out.

Q. By Mr. Cooper: Did you give any instructions to the [105] contract department or discuss with the contract department what should be done with respect to Cum-

(Testimony of Daniel Kelley)

gings' contract, or did you leave that with the contract department; do you recall?

A. I asked the contract department if it was legally right for us to suspend Mr. Cummings for the duration; and they said yes.

Q. Did you give them any instructions to proceed on that basis? A. To suspend him, yes.

The Court: May I interrupt, to make sure that I understand this answer?

Mr. Cooper: Yes, your Honor.

The Court: You used the expression "duration." The duration of what?

A. Of the war, the time he was in the service. That was the expression he used. I will answer that by saying that we have a number of contracts suspended for the duration, that we have a number of artists on suspension for the duration at the studio at the present time, because they are in the armed services.

Mr. Roth: We object to the voluntary statement of the witness.

The Court: Let it go out.

Q. By Mr. Cooper: As a result of the information that you had received from Bob Speers and the fact that Robert [106] Cummings did not appear on April 12th, in pursuance of your telegram of April 10th, did you cause his compensation to be stopped likewise?

A. Yes.

The Court: May I have that question?

(Question read by the reporter.)

Mr. Roth: We would like to have an objection before the answer to the question, on the ground that it asks the witness to state a conclusion. We haven't any objection to the witness stating that after the telegram of

(Testimony of Daniel Kelley)

April 10th was sent, and after Robert Cummings failed to appear on April 12th, he went ahead and suspended him. It makes this witness decide what may be an issue in the case.

The Court: While I think there is merit in that criticism, I am not going to accept this witness' version of what the legal decision should have been, or whether there is any legal justification for what was done.

Mr. Roth: With that statement by the court, I withdraw my objection.

Q. By Mr. Cooper: Did you know at any time after April 10, 1943, that Robert Cummings had demanded payment of salary from the studio after that time, other than the notice that you received terminating the contract on May 29th? Let me withdraw that question and put it this way. Between April 10, 1943, the date when the telegram was sent,—do you have that date in mind? [107]

A. Yes.

Q. And May 29th, which was the date you received the notice from Robert Cummings, complaining that the contract was terminated for non-payment of salary, did you know or did anyone inform you, directly or indirectly, that he was holding himself available to the studio?

A. No.

Q. Does any member of the paymaster's office or any member of the cashier's office have the authority to order payment of compensation?

A. No.

Q. Who at Universal had authority to order payment of compensation to Robert Cummings? I will withdraw that question. Assuming that an actor like Robert Cummings were under contract, and receiving a salary of \$1500 a week, and he was suspended for some reason,

(Testimony of Daniel Kelley)

who has the authority to order him put back on the payroll?

Mr. Roth: I don't think this witness is qualified to answer that question. It may or may not be the best evidence. I presume these matters of authority are covered by the proceedings of the Board of Directors. However, I don't care to interpose dilatory objections, but, subject to this, I would be willing to let the witness answer, if Mr. Cooper will furnish me with copies of the resolutions, so that I can compare them with the answers this witness may give and stipulate that if the answers are not in accordance [108] with such authority as the resolutions delegate, that the answers may be corrected, I am willing to waive any objection I may have at this time.

Mr. Cooper: I don't know of any resolution of the board of directors covering the particular authority of all employees in a large organization of this kind. However, I can assure you that we will check up on it.

Mr. Roth: I don't know whether Mr. Kelley can testify as to what the authority is of each particular officer.

The Court: Let me interrupt to say this: On the present showing, there is merit in the objection.

Mr. Cooper: That would go to its weight, may it please the court, rather than to its admissibility, would it not?

The Court: Oh, to more than its weight.

Mr. Roth: Furthermore, it is immaterial, in view of the stipulation made by counsel this morning, when he stated to the court that the check wasn't ready and that the defendant didn't intend that it be ready.

(Testimony of Daniel Kelley)

Mr. Cooper: That is true. However, in your memorandum of points and authorities you also claim that that was a demand on his part, showing that he was ready, able and willing to perform. Didn't you make that contention in there? Maybe we can do it this way. I will withdraw the last question.

Q. By Mr. Cooper: Do you have authority to order payment of salary to an actor of Robert Cummings' standing, under [109] contract, after he is put on suspension?

A. Yes.

Q. Who else at the studio, if you know, has similar authority?

Mr. Roth: I object to that as not the best evidence.

The Court: I am inclined to think that the objection is good, unless you are prepared to enter into some stipulation whereby you will check up on the proof.

Mr. Cooper: May it please the court, I will do that. Out of an abundance of caution, I will check into the resolutions of the board of directors. However, I do not believe that the records of Universal Pictures Company, Inc., or any other similar organization, will define the respective duties of employees in the organization. It is true that they will define the duties of the president, vice-president, secretary and treasurer, but as to lesser employees, that is left to the person in charge of the studio, the persons down the line acting under his direction and authority.

The Court: I am inclined to think, for example, that that proof would be admissible, showing the practice that has been followed over an extended period of time on the subject.

Mr. Cooper: Well, I think that is all. You may cross examine.

(Testimony of Daniel Kelley)

Cross-Examination

Q. By Mr. Roth: Mr. Kelley, I think you have testified that Mr. Robert Speers came into your office and told you [110] about a telephone conversation he had with Robert Cummings? A. Yes, sir.

Q. Can you fix the date when Mr. Speers came into your office, the approximate date?

A. I don't know the exact date. I know it was just a couple of days, three or four days, before we were to start the picture, because I said, "What are we going to do?"

Q. Three or four days before you were to start the picture, and you testified that the picture was to start on April 12th? A. Yes.

Q. Three or four days before that would be the 9th or the 8th?

A. The 9th or 10th, somewhere.

Q. Prior to the time that Mr. Robert Speers came into your office and told you about his telephone conversation with Robert Cummings, had he been in your office to report any other conversation that he had had?

A. He had been in once and said that Robert Cummings had talked—I don't remember whether it was Robert or Oscar Cummins,—but there was some difficulty on the director; he didn't think he was of a caliber who should direct Mr. Cummings. Whether that was from Oscar Cummins or Bob Cummings I do not remember, but either one of the two.

Q. And this conversation which you have now detailed, was that prior to the— [111]

A. It was prior.

(Testimony of Daniel Kelley)

Q. Was it a day prior or a week prior?

A. I can't tell you exactly. I would say it was a few days prior.

Q. Was anyone in your office when he transmitted that conversation to you?

A. I do not remember.

Q. About the director? A. I do not remember.

Q. Did he say anything else to you other than the fact that either Robert Cummings or Oscar Cummins had told him that the director was not satisfactory?

A. Only that he didn't think the picture, that with that director set-up, it wasn't an important picture for Robert Cummings.

Q. Did he also tell you—and by "he," I mean Mr. Speers—did he tell you that Oscar or Robert, whoever it happened to be, had also said that Robert was seriously thinking of going into the Civil Air Patrol?

A. I don't remember whether he did or not at that time.

Q. But a few days afterwards he came into your office and told you that he had had a telephone conversation with Robert Cummings, and that Robert Cummings had said, in effect, that he was not going to play the part of "Hank," and that he had signed up for the duration of the war with the Civil Air Patrol or some other military body, and that [112] he, Robert Cummings, knew that he was something of a son-of-a-bitch, but there was nothing he could do about it? Is that substantially what

(Testimony of Daniel Kelley)

Mr. Robert Speers reported to you after that telephone conversation?

A. Substantially, yes, that he was going to sign up for exclusive services in whatever service it was and not do any more pictures for the duration.

Q. And by "duration" you mean the duration of the war?

A. I don't know that he meant that.

Q. Did Mr. Robert Speers say "for the duration of the war"? A. He said "for the duration."

Q. And you accepted that as meaning for the duration of the war?

A. That was the reason we immediately sent the telegram.

Q. Was Mr. Ward in the office at the time Mr. Robert Speers transmitted that conversation to you?

A. I don't remember.

Q. Do you know whether Mr. Ward came in subsequently?

A. Either Mr. Ward or Mr. Muhl were in, and we talked about sending the wire to have him report, to find out whether he was going to do the part, and whether he was going to be in for the duration.

Q. Who came in—Mr. Ward or Mr. Muhl?

A. I said I don't remember.

Q. You don't remember? [113]

A. I don't remember.

(Testimony of Daniel Kelley)

Q. When either one of the two, when Mr. Ward or Mr. Muhl came in, was Mr. Speers still in the room with you?

A. I couldn't make a definite statement to that effect either. I don't remember.

Q. Do you know whether Mr. Speers reiterated the telephone conversation in your presence to Mr. Ward or Mr. Muhl, whoever it was that came in later?

A. He may have, but I wouldn't say that he did.

Q. In any event, after you had spoken to Mr. Ward or Mr. Muhl, you directed the sending of the wire of April 10th; is that correct?

A. That is correct.

Q. Were you told on or about April 12th that the wire of April 10th had never been delivered?

A. No.

Mr. Roth: May I have Plaintiff's Exhibit 1?

Mr. Cooper: Just a minute, if your Honor please. I object to that legal conclusion of counsel in the last question, and move that it be stricken, for that reason.

Mr. Roth: What is that?

Mr. Cooper: I contend that the wire was in fact delivered. That is a legal conclusion on counsel's part, that the wire was not delivered.

Mr. Roth: But, irrespective of that, I have a right to ask this witness whether or not this wire of April 12th, the [114] wire from Western Union to Universal Pictures Company, Inc., was ever shown to Mr. Kelley.

Mr. Cooper: Oh, I haven't any objection to that question. I beg counsel's pardon. May we have the previous question read, though, so we will get our record straight.

The Court: Very well.

(Record read by the reporter.)

(Testimony of Daniel Kelley)

Mr. Cooper: I move to strike the question and the answer, on the ground that it calls for a legal conclusion.

Q. By Mr. Roth: I show you, Mr. Kelley, a wire, which is marked Plaintiff's Exhibit 1 in evidence, from Western Union to Universal Pictures Company, Inc., Edward Muhl, Assistant Secretary, and ask you if that wire was shown to you on April 12th?

A. On April 12th?

Q. Or at any time thereafter, or on or about April 12th.

A. If it was, I don't remember.

Q. Did Mr. Muhl, or any person, inform you, on or about April 12th, that he had received a wire from Western Union Telegraph Company, the effect of which was that Universal's wire of April 10th had not been physically delivered to Robert Cummings or Oscar Cummins, but had, in fact, been telephoned to Mrs. Oscar Cummins?

A. It is very hazy, but I think there was something said about delivering it to Mrs. Cummins, yes, that part. Whether it was in a telegram or whether they told me [115] personally, I can't tell you.

Q. You just testified that you didn't see the telegram?

A. I didn't say that. I don't remember seeing the telegram.

Q. Then you couldn't have gotten the information from the telegram, and it must have come from some person?

A. That is right.

Q. Who was the person?

A. I can't positively say. It was somebody in the legal department, but I don't remember whether it was Mr. Muhl or Mr. Ward, who usually handled these things.

Q. Then you did know, on or about April 12th, that the telegram of April 10th, which Universal had sent to

(Testimony of Daniel Kelley)

Robert Cummings, and to Robert Cummings, care of Oscar Cummins, had not been physically delivered to either Robert Cummings or Oscar Cummins?

A. To his wife.

Q. Did you understand that it had been physically delivered to his wife?

A. That is what I understood, yes.

Q. Did someone tell you that?

A. That is right.

Q. You don't know who that someone was?

A. No, I don't.

Q. Is this the first time you have seen, or that you can remember seeing this Plaintiff's Exhibit 1? [116]

A. That I can remember, yes.

Q. After you received this information that it had been physically delivered to Mrs. Oscar Cummins, and by "it" I mean Universal's telegram of April 10th, did you do anything about it?

The Witness: Will you read that again?

(Question read by the reporter.)

A. No. I knew—I thought we were in the clear by it being delivered to his wife.

Mr. Roth: I move that the answer of the witness after "No," go out.

The Court: It may go out. After the word "No" the answer will be stricken.

Q. By Mr. Roth: Did you at any time after April 10, 1943, to and including June 1, 1943, communicate with Robert Cummings in any way? A. No.

Q. Did you between those dates, to-wit, April 10, 1943, and June 1, 1943, communicate with Oscar Cummins in any way? A. No.

(Testimony of Daniel Kelley)

Q. Isn't it a fact that sometime between April 10, 1943, and prior to the conclusion of the picture "Fired Wife," you were called up by someone at Metro-Goldwyn-Mayer, who told you that if Universal would take Robert Cummings off suspension, they could persuade Robert Cummings to do a picture for them? [117]

A. What is that question again?

Mr. Roth: Will you read it, Mr. Reporter?

(Question read by the reporter.)

A. No.

Q. No one—

A. Not the way you put that question, no.

Q. Let me see if I can put it so that I can get an answer. Did you receive any information from any source prior to the conclusion of the picture "Fired Wife," that if Universal lifted the suspension on Robert Cummings, M-G-M or some other studio could persuade Robert Cummings to do a picture for them?

A. You say if we lifted the suspension?

Q. Yes. A. No.

Q. Did you receive any message from any person or studio during the time that Universal was making the picture "Fired Wife" that such other person or studio could persuade Robert Cummings to do a picture for them? A. No.

Q. Did you have a discussion with any other producer of pictures on the subject of Robert Cummings, during the time that Universal was making the picture "Fired Wife"?

A. I don't believe it, not while we were making "Fired Wife."

(Testimony of Daniel Kelley)

Q. Did you have such a discussion or conversation after [118] you had completed "Fired Wife"?

A. After June 1st?

Q. Not after June 1st, but after—

A. Yes.

Q. You say after June 1st?

A. I think it was after June 1st.

Q. Did you say that there was any such conversation prior to June 1st? A. I don't believe so.

Q. Who did you have the conversation with after June 1st?

A. You want to know definitely the man's name?

Q. Yes. A. Mr. Benny Thau.

Q. Would you say that was after June 1st?

A. I would say so. I don't know the exact date.

Q. What was the conversation?

A. Only that Mr. Oscar Cummins was over to see him and said he was no longer under contract to Universal, and he wanted to tip us off.

Q. Then Mr. Thau did not ask you—

A. He said, "If I can help, I will be very glad to."

Q. Is that the whole conversation?

A. As I remember it. He said, "If I can help, I will be glad to help, and I think I can."

Q. Did you have any further conversation with Mr. Thau [119] after that?

A. I think there were two or three conversations along that matter, and I said I thought we were very capable of handling our own contract matters without asking for help from some other studio.

Q. In any other conversation with Mr. Thau was anything said about M-G-M being able to persuade Robert

(Testimony of Daniel Kelley)

Cummings to do a picture for them if the suspension were lifted by Universal?

A. If I remember correctly, he said, "I can help you. If you need our help, I will be very glad to do that for you." I don't think he said anything about lifting any suspension, no.

Q. Your answer, then, is no? A. No.

Q. After April 10, 1943, did you have any further conversation with Mr. Speers, Mr. Muhl or Mr. Ward in respect of the intentions of Robert Cummings not to perform services for Universal by reason of the fact that he was going to enlist in the Civil Air Patrol or some other military arm for the duration of the war?

A. That is correct.

Q. You did have? A. Only at that time.

Q. Did you have any conversation with any of those gentlemen after that time? [120]

A. After we sent the wire of April 10th?

Q. Yes. A. No, not to my knowledge.

Q. But at that time, at least, the matter was discussed fully with Mr. Speers, Mr. Ward and Mr. Muhl?

A. I don't know whether it was with Mr. Speers. It was with Mr. Ward and Mr. Muhl.

Q. Mr. Speers is the man that gave you the information originally?

A. That he wouldn't work in the picture, yes. Whether I told him or not, I don't remember, that we had suspended him for the duration.

Q. Didn't Mr. Speers tell you that Robert Cummings was not going to do the picture "Fired Wife"?

A. That is correct.

(Testimony of Daniel Kelley)

Q. Because he was signing up for the duration of the war with the Civil Air Patrol, and he wasn't going to make any more pictures for the duration?

A. That is right.

Q. Because he was doing that. That is the first information you had? A. That is right.

Q. That is the one and only time you discussed it with Robert Speers?

A. No, I wouldn't say that. That was prior to April 10th. [121]

Q. After April 10th did you discuss it with him?

A. No. After he didn't report on April 12th, Mr. Cummings, as far as I was concerned, he was on suspension, and we considered him on suspension for the duration. There was no more discussion, to my knowledge, after that.

Q. Did you read the notice of April 10th?

A. No, I didn't. I just told them, the legal department, to send him the telegram, and the legal department phrased it and sent it to Mr. Speers.

Q. Is Mr. Muhl in charge of the legal department?

A. He is.

Q. Is he a lawyer?

A. He is in charge of the legal department at the studio, under Loeb & Loeb, who are the attorneys for the studio, as I understand.

Q. Mr. Muhl himself is not an attorney?

A. No, sir.

Q. But he is in charge of the legal department at the studio?

A. At the studio, under the attorneys Loeb & Loeb.

(Testimony of Daniel Kelley)

Q. Mr. Kelley, on or about, or exactly on the first day of November, 1943, you signed an affidavit in this case. Do you remember signing one? A. Yes.

Q. Who did you give the information to upon which the affidavit was predicated? [122]

A. Mr. Erlich.

Q. Was the affidavit drafted by Mr. Erlich, or was it drafted by Loeb & Loeb? A. I don't know.

Q. I show you, Mr. Kelley, that affidavit of yours, which consists of approximately seven pages, and ask you to point out to the court, at any place in that affidavit, any reference to the conversation that you had with Mr. Speers or with Mr. Muhl or with Mr. Ward, in which Mr. Speers said to you, substantially or in effect, that Mr. Robert Cummings had called him up on the telephone, and that he was not going to play the part of "Hank" in "Fired Wife," that he had signed up with the CAP for the duration of the war, and he was not going to make any further pictures?

Mr. Cooper: To which I object as immaterial, in view of the nature of Mr. Kelley's affidavit. I will stipulate, as a matter of fact, that there is no reference at all in the affidavit to it, and I object to the question.

Mr. Roth: I will accept the stipulation that there is nothing in the affidavit with reference to that conversation, but the effect of it I am perfectly willing to argue.

The Court: What is the date of that affidavit?

The Witness: November 1, 1943.

Mr. Roth: November 1, 1943.

Q. By Mr. Roth: When you received the information, on or about April 12th, from some person whose name you cannot [123] remember, that the telegram of

(Testimony of Daniel Kelley)

April 10th, Plaintiff's Exhibit 1, had not been physically delivered to Robert Cummings or to Oscar Cummins, but that it had been physically delivered to Mrs. Oscar Cummins, did you make any effort to check up after April 12th and find out whether Robert Cummings had actually signed up for the duration of the war with any branch of the military services?

A. I did not. I thought he and his wife were good friends.

Q. Mrs. Oscar Cummins, for your enlightenment.

A. Robert Cummings—my understanding was that it was Mrs. Robert Cummings.

Q. I thought I was rather clear and specific.

A. I thought it was Mrs. Robert Cummings.

Q. It is your testimony that you were told that it was delivered physically to Mrs. Oscar Cummins.

A. Yes; I understood it was Mrs. Bob Cummings. I may have misunderstood, but that is what I understood, that it was Mrs. Robert Cummings.

Q. You understood that the telegram of April 10th had been physically delivered to Mrs. Robert Cummings?

A. That is right.

Q. Correcting your previous testimony, then, and assuming that that was your understanding, did you, after April 12th, when you knew that Robert Cummings had not reported at the studio, do anything to check up and [124] investigate, for the purpose of finding out whether Robert Cummings had actually signed up with any branch of the armed forces of the United States for the duration of the war? A. No.

Q. Did you do anything about it?

A. I asked the legal department if we were clear on our contract, and they said yes.

(Testimony of Daniel Kelley)

Q. Did you do anything other than that?

A. No.

Q. Who in the legal department did you ask, and who said yes? A. Mr. Muhl.

Mr. Roth: That is all.

Mr. Cooper: I would like to ask one or two questions as on direct examination.

Redirect Examination

Q. By Mr. Cooper: Was it your desire at all times to use the services of Robert Cummings?

A. Yes.

Q. Did you consider the services of Robert Cummings valuable or otherwise?

A. We considered him a personality that was valuable.

Q. Were you at all times ready and willing to pay him his compensation, provided he reported to the studio?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, no part of the issue in this case, and asking the [125] witness to decide a question of law.

The Court: I think it calls for a legal conclusion. In other words, the defense is entitled to bring out all of the facts showing the course of conduct followed by the employer, and from that, of course, appropriate conclusions may be drawn.

Mr. Cooper: Very well, if your Honor please. I think that is all, Mr. Kelley. Does your Honor care to continue? We have some other witnesses.

The Court: I think we will resume in the morning at 10:00 o'clock.

(Whereupon an adjournment was taken until 10:00 o'clock a. m. the following day, Wednesday, January 5, 1944.) [126]

Los Angeles, California, Wednesday, January 5, 1944;
10:00 A. M.

(Parties present as before.)

The Court: You may proceed.

Mr. Cooper: With the court's permission, I should like to recall Bob Speers as on direct examination.

ROBERT SPEERS,

a witness heretofore duly sworn on behalf of defendant,
upon being recalled, testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Speers, while you were on the witness stand yesterday you testified that on April 10th you had the three telegrams dated April 10th on your desk, and you waited for a period of some hours before you ordered them sent to the telegraph company. Now some time after April 5th, and before April 10th, did you have a conversation with Oscar Cummins on the telephone? A. Yes, I did.

Q. Do you recall what date that was?

A. No, I don't recall exactly. It was, I believe, either later in the day of April 5th, the day on which I spoke to Bob Cummings on the telephone, or the following day. It was within a day or two of that conversation.

Q. Did you call him or did he call you?

A. He called me. [127]

Q. At your office? A. Yes.

Q. At the studio? A. Yes.

Q. Did you recognize his voice? A. Yes, sir.

Q. Had you had business dealings with him for a period of time? A. Yes.

Q. You had talked with him on the telephone before?

A. Yes.

(Testimony of Robert Speers)

Q. Will you relate that conversation?

A. Oscar said that he had been advised by Bob of Bob's decision regarding the picture, and said he was going to have another talk with Bob, and he thought there was a possibility that after talking it over with him, with Bob, Bob might change his mind and decide to do the picture after all.

Q. What else did he say?

A. I think that is about the substance of it. I was just going to say that we had many times in the past discussed this situation, Oscar and Bob and I.

Q. Before April 5th? A. Yes.

Q. And before April 3rd? A. That is right.

Q. That is, with respect to his doing that part? [128]

A. Yes.

Q. Was anything said at that conversation as to you communicating with Oscar Cummins or his further communicating with you?

A. My recollection is that he said he would let me know.

Q. Was that the reason you waited until that late hour before sending the telegrams?

A. Yes. I talked the matter over with Bud Ward when the telegrams were prepared.

Mr. Roth: I object to that, if your Honor please.

The Court: Let that go out.

Mr. Cooper: You may cross examine.

Mr. Roth: No cross examination.

Mr. Cooper: That is all. Ed Muhl, please.

The Court: Will you hold the witness for a moment?

Mr. Cooper: Yes, your Honor.

The Court: Very well. [129]

EDWARD MUHL,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Edward Muhl.

Direct Examination

Q. By Mr. Cooper: Mr. Muhl, what is your business or occupation?

A. The motion picture business.

Q. And in what capacity? With whom are you employed, or by whom are you employed?

A. Universal Pictures Company, Inc.

Q. How long have you been employed by Universal?

A. Since 1927.

Q. In what capacity are you employed at the present time?

A. I am assistant secretary of the corporation, in charge of the contract department.

Q. What, generally, are the duties of the contract department?

Mr. Roth: Objected to as immaterial.

The Court: He might state his duties.

Q. By Mr. Cooper: You are the head of the contract department? A. Yes, sir.

Q. What are your duties as head of the contract [130] department?

A. We have custody of all contracts and assist in the formation of all contracts and their preparation, in connection with studio business.

Q. Do you keep records of suspensions?

A. Yes, sir.

Q. Do you order suspensions? A. Yes.

(Testimony of Edward Muhl)

Q. Do you order the exercise of options upon notice from somebody else? A. Yes.

Q. Do you have power and authority to reinstate a person who has been suspended?

Mr. Roth: I object to that, if your Honor please.

The Court: I think the question in that form is open to criticism. The witness can state the practice followed for any extended period.

Q. By Mr. Cooper: What was the practice at Universal Pictures Company, Inc., with respect to reinstating an actor who had been placed on suspension?

A. After the expiration of the condition which causes the suspension, we order the person reinstated on the payroll for the salary to be paid.

Q. Who would you notify?

A. Notify Harold Brewster, assistant treasurer and controller, his assistant, the office manager, and the pay-[131] master.

Q. Who was the paymaster?

A. Ben Steinberg.

Q. What was the practice with respect to disputes over salary?

The Court: May I interrupt to ask if you will have the witness indicate, as far as he knows, over what period of time this practice was going on.

Q. By Mr. Cooper: Over how long a period of time did that practice exist that you have just related?

A. For at least the last five years.

Q. How long have you been head of the contract department? A. About ten years.

Q. What was the practice with relation to disputes over the payment of salaries?

(Testimony of Edward Muhl)

Mr. Roth: Objected to as immaterial. The question calls for disputes as to amounts, I assume.

The Court: You might clarify the question.

Mr. Cooper: Yes, your Honor.

Q. By Mr. Cooper: What was the practice with respect to the handling of disputes? Assuming that an actor or actress claimed that there was money due that may or may not have been due, what was the practice with respect to the handling of such disputes?

Mr. Roth: Objected to as immaterial. [132]

The Court: On the assurance of counsel that evidence will be introduced showing that this plaintiff was aware of the practice, the objection will be overruled.

Mr. Cooper: I think we can show that, if your Honor please—the plaintiff's agent—not the plaintiff personally. You may answer the question.

A. Normally, if there is any dispute concerning a payment to an actor, that is, salary due or due in a different amount than has been paid, the practice would be for the actor or the actor's representative to contact my office with reference to it, and they follow through and find out what the basis for the misunderstanding or dispute was.

Q. And on occasions did you consult any law firm?

A. Loeb & Loeb, our counsel, were consulted very often.

Q. Had you had any disputes in the past with Robert Cummings, through his agent, Oscar Cummins, with respect to the payment of amounts or the non-payment of salary?

The Court: Is this for the purpose of showing knowledge on the part of the plaintiff of that practice?

(Testimony of Edward Muhl)

Mr. Cooper: It is for that purpose, your Honor.

The Court: Unless the plaintiff is not intending to dispute the fact that he was aware of this practice, it would seem to me that the question is a proper one. You may answer.

The Witness: May I have the question read, please?

(Question read by the reporter.)

A. From time to time questions had arisen as to the [133] amount of money due on certain payments, such as bonus, which became due at certain times under our arrangement with Mr. Cummings, and my office, including myself, was contacted from time to time about those questions.

Q. By Mr. Cooper: Who would contact you?

A. Mr. Oscar Cummins.

Q. Has he contacted you on more than one occasion?

A. Yes.

Q. Can you recall some specific occasions?

A. I cannot recall dates but, for example, on the conclusion of Robert Cummings' services in a photoplay, there was a bonus payable to him, whether the picture was completed for us or for outside services, and on a number of occasions—

Q. Let us take that particular case.

A. Yes.

Q. I believe the contract provided, in substance, that upon completion of a picture he was entitled to a bonus of \$2500 or \$7500, at the time of completion. Did somebody come to pick up that check? A. Yes.

Q. Who? A. Oscar Cummins.

Q. Was the check all ready for him?

A. On some occasions it was not ready.

(Testimony of Edward Muhl)

Q. On some occasion when it wasn't ready, do you recall some specific occasion when Oscar Cummins came to you about [134] the situation?

A. Oscar Cummins both came to me and called me on the telephone about several checks.

Q. As late as April 15th, 1943, were you aware of some dispute with respect to the payment of the amount of a check? A. I heard of some.

Q. You didn't handle that situation yourself?

A. No.

Q. Who did handle that? A. Emmett Ward.

The Court: May I inquire whether Mr. Ward is in your department. A. Yes, sir.

Q. By Mr. Cooper: Directing your attention to some time before April 10, 1943, did you learn from some source what Robert Cummings had notified Bob Speers?

A. Yes.

Q. From whom did you learn that?

A. I learned it in this way, from Emmett Ward, and, secondly, from Bob Speers.

Q. What did Bob Speers tell you about that?—merely for the purpose of showing knowledge, and not for the purpose of proving the truth of the statement?

A. I was advised that Cummings was not going to do the role in the picture that we wished him to do, and furthermore that we would have no more of his services for the [135] duration, because he was signing up with some service, either the Civil Air Patrol or something connected with the Army Air Corps.

Q. Did you believe that? A. Yes.

(Testimony of Edward Muhl)

Q. Sometime later you received the same information from Emmett Ward?

A. I think it was just the reverse in order.

Q. You received the information first from Emmett Ward, and then from Bob Speers? A. Yes.

Q. All right. At the time you learned this information from Emmett Ward did he show you a letter dated April 9th, or did that come later?

A. That came later.

Q. After you learned about Bob Cummings' status, what did you do?

Mr. Roth: Just a moment. I object to that as assuming that he did learn about Bob Cummings' status, assuming that there was any status.

Mr. Cooper: You may be correct. I will withdraw the question.

Q. By Mr. Cooper: When you were told that Bob Cummings was not going to be available to you for the duration of the war, did you do anything about it? Answer that yes or no.

A. Not immediately. [136]

Q. Did you also learn from some source that Oscar Cummins had phoned someone at the studio?

A. I have a recollection that there still was some possibility of conciliating the difficulty that had arisen, and that was the reason for not doing something immediately.

Mr. Roth: I move that that go out as a voluntary statement of the witness and not responsive to the question.

The Court: May we have the question?

(Question read by the reporter.)

The Court: Of course, the answer is not responsive, but I think it would be relevant at some time to inquire

(Testimony of Edward Muhl)

of the witness whether or not there was any explanation as to why he did nothing immediately upon receiving the information that he previously outlined.

Q. By Mr. Cooper: Had you also had some conversation with Dan Kelley during this period of time between April 5th and April 10th? A. Yes.

Q. About this particular subject matter of Robert Cummings? A. Yes.

Q. Now, on April 9th was a letter presented to you for your signature? A. Yes.

Mr. Cooper: I show this letter to counsel.

Q. On April 9th had you heard anything either from [137] Robert Cummings or Oscar Cummins?

A. Not that I recall. I heard nothing directly.

Q. On April 9th did you still believe that Robert Cummings would not be available to you for the duration?

A. Yes.

Q. I show you a letter which I have heretofore shown counsel, and ask you to examine that. Did you dictate that letter? A. No.

Q. Who dictated that letter?

A. Emmett Ward.

Q. Did you send that letter? A. No.

Q. Did that letter cause you to further believe that Robert Cummings would be unavailable to you for the duration?

Mr. Roth: Just a moment. The question now asks the witness for a state of mind predicated upon what someone in his department thought, and not on anything the plaintiff or any agent of the plaintiff said.

(Testimony of Edward Muhl)

The Court: While I recognize that this witness is giving testimony relative to information conveyed to him by those acting in the usual course of business, I haven't seen this paper, and I don't know whether there is merit in the objection or not. Perhaps I had better see the document and see if it throws any further light on the matter.

Mr. Roth: We haven't any objection to the court looking [138] at the paper. As a matter of fact, I was going to offer it myself, but in the question put to the witness he is asked to state his opinion as to whether or not his belief was fortified or reaffirmed from what someone in his department thought.

The Court: I am inclined to think there is merit in the objection, but before I make any ruling I would like to see the paper.

Mr. Cooper: If you still want to offer it for any purpose, I am perfectly willing.

Mr. Roth: Well, it is your offer.

The Court: I think the question as it is now put is open to the criticism made.

Mr. Cooper: Will you read the question to me, please, Mr. Reporter?

(Question read by the reporter.)

Mr. Cooper: I do not understand the effect of your Honor's remarks.

The Court: I have already indicated that the witness would be allowed to tell what information came to him from those purporting to have received it from sources on which they had a right to rely, but the question in its present form appears to ask the witness, in effect, to

(Testimony of Edward Muhl)

testify whether he agreed with the conclusion somebody else had reached, and I don't think that is a proper question.

Mr. Cooper: Well, if your Honor please, we will put the [139] question in another way.

The Court: In other words, if no further information came to the witness, then I don't see that this letter is of any help.

Mr. Cooper: I have put the question in that form to show the conduct of Universal, based upon the information received from Robert Cummings, and what they did, that they relied on it, exactly what they did.

Mr. Roth: We object to the statement of counsel. We have no objection to showing the conduct of Universal. What it was based upon will be decided by the court.

The Court: I take it, of course, that defense counsel is merely expressing his views. You haven't offered the paper for the purpose of showing that Universal pursued any particular course of conduct?

Mr. Cooper: Possibly I am premature on that. May I ask that it be marked for identification only at this time.

The Court: That will become Defendant's Exhibit C for identification.

Q. By Mr. Cooper: In any event, this letter of May 9th was not sent? A. That is right.

Q. Thereafter did you cause to be prepared or discuss with somebody in your office the telegrams of April 10th?

A. Yes.

Q. On April 13, 1943, did you have a conversation with [140] Oscar Cummins? A. Yes.

(Testimony of Edward Muhl)

Q. Have you an independent recollection of that conversation? A. Yes.

Q. Did you also refresh your recollection as to the specific details of that conversation from some document you made at the time? A. Yes.

Q. Do you know exactly what time on April 13th you had that conversation? A. Yes.

Q. What time of the day was it?

A. Between 12:00 and 1:00 o'clock.

Q. Do you have that document with you?

A. I have a copy of it.

Mr. Cooper: All right. I will show this to counsel.

Mr. Roth: Is this what he had?

Mr. Cooper: Yes. I may have made some notations on that one. You may examine the one he has. I have here the file, counsel.

Mr. Roth: That is what I thought I was looking at.

Mr. Cooper: No. That is a copy.

Q. By Mr. Cooper: What was the exact time of that conversation of April 13th? A. 12:40 p. m. [141]

Q. Did you, following that conversation, dictate a memorandum of the substance of the conversation, and the time? A. Yes.

Q. At what time after that conversation, or at what time on April 13th, did you dictate the memorandum?

A. 12:46.

Q. Three minutes later?

A. Yes—two minutes later.

Q. Will you relate the conversation that you had with Oscar Cummins at 12:40 p. m. on April 13th?

A. I earlier tried to get him that day, and he called me back sometime after 12:30, at the time of this conver-

(Testimony of Edward Muhl)

sation, and I told him that, following the information that Bob Speers had gotten from Bob Cummings over the phone, that is, to the effect that he was not going to do any more pictures for us for the duration of the war, that we had wired him to report to Dan Kelley's office on the 12th at 10:00 o'clock, and that, of course, he hadn't reported, and we intended to suspend him from the payroll as of that date. I sent him a wire—

The Court: Have him read the memorandum.

Q. By Mr. Cooper: Will you read the memorandum, then?

A. "I talked to Oscar Cummins at 12:40 p. m. April 13, 1943. Told him that following up Robert Cummings' statement to Bob Speers given over the telephone that he was in the C. A. P. for the duration and that in effect he would not [142] report for his role in the photoplay 'Fired Wife,' that we had wired Cummings to report yesterday morning to Dan Kelley, and that, of course, he failed to do so, and that we, to establish a clear position, intend to suspend him from payroll as of that date. Oscar said that was entirely proper. He further stated that he was 'sick' at the situation which had arisen and he had talked to Bob last night and that he was trying to get him to come in to have a further discussion with Bob Speers and myself. At this point I told him we were, of course, going forward with our plans to recast the role and he said he understood we would have to do this but that he didn't think this situation is fair to Bob or to the studio or to Bob's country and he would like to straighten it out."

Q. Thereafter the notice of April 15th was sent?

A. Yes.

(Testimony of Edward Muhl)

Q. Did you dictate that notice? A. No, sir.

Q. Did you see it before it was sent out?

A. Yes.

Q. Under your direction? A. Yes, sir.

Q. At the time that you sent out that notice of April 15th did you believe that Robert Cummings would be unavailable to you for the duration?

A. Nothing occurred to change my mind. [143]

Q. Now, then, on May 18, 1943, you sent another notice? A. May 18th.

Q. That is the date before the substitute completed the portrayal of the role of "Hank"? A. Yes.

Q. At that time did you still believe, or did you believe, that Robert Cummings would be unavailable to you for the duration? A. Yes.

Q. Had you ordered him taken off suspension?

A. No.

Q. Had you heard from Robert Cummings or Oscar Cummins in any manner, shape or form, between the conversation of April 15th and the sending of the notice of May 18th, to the best of your recollection?

A. No. May I expand that a little bit? I might have talked to Oscar over the telephone, but I did not receive any information leading me to believe that Cummings was later able to come.

Q. Was there any conversation, that you recall, with respect to this situation? A. No.

Q. On May 28, 1943, did you have a conversation with Oscar Cummins? A. Yes.

Q. Before you had this conversation with Oscar Cummins [144] on May 28, 1943, had you received some information from Dan Kelley? A. Yes.

(Testimony of Edward Muhl)

Q. With respect to a phone conversation he had had with Benny Thau or with Mr. Fred Datig?

A. Yes. Kelley told me that someone from Metro had called him.

Mr. Roth: I understood that Mr. Kelley denied it yesterday. I don't mind if he testifies to it.

Mr. Cooper: I just handed counsel a transcript of those conversations from our files. May I state this, if your Honor please, so that your Honor may follow the sequence of this: Mr. Kelley, on cross examination, testified yesterday, in reply to questions by Judge Roth—

The Court: I don't understand that we are arguing the case. Is there any occasion to go into the matter while the witness is on the stand?

Mr. Cooper: Yes, your Honor, I believe there is, and certainly if I finish the statement counsel will not object to it.

Mr. Roth: I am objecting even before I hear it, because I don't think there is any necessity for counsel to outline the procedure to the court. I think the court can understand things as they go along.

The Court: May I suggest that we might proceed with another question, and in the event that some uncertainty [145] arises you may then call it to my attention.

Mr. Roth: May I have a moment to look at the witness' statement?

Mr. Cooper: He is not going to testify to that statement, counsel. I am going to go on with another matter.

Mr. Roth: You handed it to me.

Mr. Cooper: Because of some objection you made a few moments ago. I handed that to you because you made some objection.

(Testimony of Edward Muhl)

Mr. Roth: You asked him a question as to whether or not he received information from Dan Kelley as to whether or not Dan Kelley had a conversation with Benny Thau on or about May 28th, and I said I had no objection to it, because I understood Mr. Kelley to deny it yesterday.

Mr. Cooper: Mr. Kelley testified that he had a conversation, he thought, about June 1st. We intend to recall him to show that it was actually May 28th.

Mr. Roth: He said after July.

Mr. Cooper: The actual record of the conversation—

The Court: Let us go on.

Mr. Cooper: Very well.

Q. By Mr. Cooper: Did you receive some information from Mr. Dan Kelley—answer this question yes or no—with respect to a conversation he had had with Benny Thau and Mr. Datig? A. Yes. [146]

Q. Following that did you phone Oscar Cummins?

A. Yes.

Q. Do you have a memorandum of that conversation?

A. Yes, I do.

Q. Will you read that memorandum, to refresh your recollection as to the details of the conversation? Do you remember the substance of the conversation?

A. Yes.

Q. Do you remember exactly what time it was that you phoned him? A. Yes.

Q. What time was it?

A. Six after ten in the morning.

Q. Did you, following this conversation, dictate the substance of that conversation to your secretary?

A. Yes.

(Testimony of Edward Muhl)

Q. At what time did you dictate that?

A. Late in the afternoon of the same day.

Q. Do you recall exactly what time it was?

A. Not exactly—between 5:00 and 6:00 o'clock.

Q. Refresh your memory as to the time.

A. 5:55.

Mr. Cooper: Counsel, have you seen this?

Mr. Roth: If it is the intention to ask about what Dan Kelley said to Edward Muhl, I am perfectly willing that that be read into the record. [147]

Q. By Mr. Cooper: Will you take that memorandum that you prepared at 5:55 p. m., and from that refresh your memory, and read us the conversation that you had with Oscar Cummins. Don't read the first sentence.

A. Start at the second sentence?

Q. Yes.

Mr. Roth: Read it all.

Q. By Mr. Cooper: Read it all, then.

A. The first sentence too?

Q. Yes. He wants the whole thing.

A. "After Mr. Kelley advised me that Robert Cummings had been offered to Metro, I stated I would call Mr. Oscar Cummins and make an inquiry as to the matter. I reached Mr. Cummins on the phone at 10:06 a. m. 5-28-43, and told him I had heard a rumor that Metro was interested in Robert Cummings and did he know anything about it. He stated he didn't know anything about it. He further stated that PRC, a producing organization that he had not heard of before called him and asked about Cummings' availability and he advised that Cummings was engaged in work in connection with the establishment of an air shuttle service and if anybody wanted him they

(Testimony of Edward Muhl)

would have to see General Arnold of the Army Air Corps to get him. He asked what had disturbed me about it. I said that I wasn't disturbed, I merely considered it a rumor, but that I decided to get him since he would know all about it and have it disproved. I said I wanted to [148] know if anybody had suggested to Metro that Cummings' suspension had been terminated or that he was in any way free of his contract with us or free to work with anybody else. He said he was positive there was nothing like it."

Q. On May 28th, which was a day or two after the alleged demand by Oscar Cummins at the studio for the payment of his compensation, did you know that any such demand had been made? A. No.

Q. Had anybody informed you of it? A. No.

Q. In this conversation with Oscar Cummins did he mention, directly or indirectly, anything about—

Mr. Roth: That is objected to as leading and suggestive and argumentative. He already testified to the conversation.

Mr. Cooper: That is correct, but we certainly have a right to suggest a particular topic, to find out whether anything else was said.

The Court: In view of the fact that there was apparently a dispute here, I think we ought to proceed rather differently. The question does bear the earmarks of a suggestion as to the answer. I will sustain the objection.

Q. By Mr. Cooper: I will ask you this: Was anything else said in that conversation? A. No.

Q. Following that conversation with Oscar Cummins, did [149] you know whether or not anyone had made a

(Testimony of Edward Muhl)

demand for the payment of Robert Cummings' compensation?

Mr. Roth: Objected to as calling for hearsay.

The Court: May we have the question?

(Question read by the reporter.)

Mr. Roth: And on the further ground that it assumes that it is necessary for him to know.

The Court: In other words, you might tell us the theory upon which you are addressing this inquiry to this particular witness.

Mr. Cooper: Very well. The witness testified with respect to the procedure and practice in the past, and at all times heretofore when there has been a dispute the matters have been taken up with the contract department, of which he was the head.

The Court: It has already been established that neither the plaintiff nor his representative contacted either this gentleman or anyone in his department.

Mr. Cooper: I understand, if your Honor please, but I want to show that he didn't know, in fact. I will withdraw the question and put it in another way.

Q. By Mr. Cooper: What was the first information that you received with respect to the fact that Robert Cummings was claiming compensation?

A. The letter dated May 29th, the letter, in any event, from Robert Cummings, announcing that the contract with us [150] was finished.

Q. That was a telegram, was it not?

A. A telegram, a communication.

Q. On June 3rd did you have a conversation with Oscar Cummings on the telephone? A. Yes.

(Testimony of Edward Muhl)

Q. What time did that take place?

A. It was in the morning.

Q. There was a record made of that conversation too.
What time was that made?

A. These notes show 12:32 p. m.

Mr. Cooper: I hand those notes to counsel.

Q. By Mr. Cooper: Will you relate the substance of the conversation?

Mr. Roth: Will you hold it for just a moment while I look at this?

Mr. Cooper: Yes.

Mr. Roth: Is this the only copy of that?

Mr. Cooper: That is the only copy I have.

Mr. Roth: It will save time if you will establish a foundation and read this.

Mr. Cooper: Very well.

Q. Now, pursuant to the suggestion of counsel, was a record made of that conversation by your stenographer?

A. Yes.

Q. Is that the conversation you have before you?
[151] A. Yes.

Q. At counsel's suggestion, read it into the record.

Mr. Roth: I assume that it was dictated.

Mr. Cooper: It wasn't dictated.

Mr. Roth: The girl took it?

Mr. Cooper: That is right.

A. "Mr. Cummins: Hello, Ed, here we are at it again.

"Mr. Muhl: Yes.

"Mr. Cummins: I wanted to talk this thing over with you at your convenience.

(Testimony of Edward Muhl)

"Mr. Muhl: Well, Oscar, all right,—what is your position in the matter—from my last talk with you, you didn't know what was taking place.

"Mr. Cummins: I didn't—I told you the truth.

"Mr. Muhl: Well,—

"Mr. Cummins: This came up—we have gone over it completely and thoroughly with Joe, myself and another counsel, and they have decided definitely there is a breach of contract here—they have decided that their next step is clear.

"Mr. Muhl: If you want to talk about it, all right, but I don't think there is a breach of contract. We have handled a lot of these things and we have not lost any on such cause in our lives and I don't think we will. Opinions are held by anybody and particularly in every lawsuit there is one held by two attorneys at least, but naturally a simple [152] courtesy for each other demands that if anything can be gained by talking, well, surely.

"Mr. Cummins: Nothing can be lost.

"Mr. Muhl: I would be willing to see you any time you say.

"Mr. Cummins: Eddie, I want to discuss this thing privately. If there is any hope to work anything out I would like to do it.

"Mr. Muhl: That's all right, since it's in a formal phase I don't think it should be completely private. I don't want to get into it, if I say anything you must realize it—from now at least so long as the status is that of a clinch I think in duty to our respective interests it cannot be completely private and confidential.

(Testimony of Edward Muhl)

"Mr. Cummins: As far as I am concerned, frankly, you can be sure that anything I say to you, you should have the right to discuss it with anyone—I could never look myself in the face if I did anything—I do claim your friendship.

"Mr. Muhl: Since you represent Bob I don't think any conversations can be in confidence.

"Mr. Cummins: Only fair play.

"Mr. Muhl: We are all reserving our rights.

"Mr. Cummins: I sent you another telegram today with Bob's consent.

"Mr. Muhl: I haven't it yet.

"Mr. Cummins: I would like to discuss it with you to [153]work something out. I have to be at the doctor's at 2.

"Mr. Muhl: I also have an appointment—someone from downtown, around that time.

"Mr. Cummins: Suppose I get there around 3.

"Mr. Muhl: Supposing you check with me at 2:30 or 3."

Q. By Mr. Cooper: Following that telephone conversation—

The Court: Let me interrupt to make sure that I followed some previous testimony. What did I understand you to say, Mr. Muhl, as to the memorandum being dictated on May 28th, about 5:55 p. m.? What was that?

A. That was a memorandum of a conversation with Mr. Cummins.

The Court: Was that this one?

A. No, sir. This was on June 3rd.

(Testimony of Edward Muhl)

Mr. Roth: The other one, I think, has already been read? A. That is correct.

Mr. Cooper: I have another one. I think counsel might take about five minutes to read it. Does your Honor take a morning recess or not?

The Court: Well, if counsel wishes.

Mr. Cooper: No, it isn't necessary, but I just thought that if you did this would be a good time to do it.

The Court: Very well. We will take a five-minute recess.

(Short recess.)

Mr. Roth: Was that on June 1st?

A. June 3rd. [154]

Mr. Roth: I am willing that that may be read into evidence by the witness, with the exception of the parenthetical inserts which are in that typewritten copy.

Q. By Mr. Cooper: Following your phone conversation with Oscar Cummins that you have just related, on the same date did he visit you at your office?

A. Yes.

Q. Did you have a conversation in the office?

A. Yes.

Q. Who were present at that conversation?

A. Myself and Mr. Emmett Ward, after the first moment. In other words, Emmett Ward—

Q. In other words, Emmett Ward was not there at the first moment, for the first moment or two of the conversation, and came in afterwards? A. That is right.

Q. Following this conversation between you, at which Emmett Ward was present, and Oscar Cummins, did you dictate the substance of that conversation to your secre-

(Testimony of Edward Muhl)

tary, to refresh your memory as to the specific details?

A. Yes.

Q. How long after the conversation did you dictate it?

A. Within a few moments, certainly not over half an hour.

Q. What time did you actually dictate it?

A. 4:44 p. m. [155]

Q. The conversation started when? A. 3:40.

Q. With counsel's permission, you may read it, leaving out the observation in parentheses.

Mr. Roth: At the bottom of the page, and the first three or four lines of the second page.

The Witness: In the paragraph following that there is some data.

Mr. Roth: That is conversation, I take it?

A. Yes.

Mr. Roth: He said he outlined the proposition—all right.

A. "I met today with Mr. Oscar Cummins pursuant to an appointment requested by him. He arrived at 3:15 p. m. but I was tied up until approximately 3:40 p. m. Mr. Ward was present during the entire conversation, excepting the first few seconds, which were spent in nothing more than greetings.

"Mr. Cummins opened the conversation jovially by stating 'Well, here we are again.' He stated that when I talked to him over the telephone last week that he actually had known nothing about the position that was being taken by Cummings, that he had been truthful and sincere in his conversation. He further stated that the situation between Cummings and Universal had been reviewed by himself, his brother, and another attorney, former Justice

(Testimony of Edward Muhl)

of the Supreme Court of the State of California, and they decided there was a definite [156] breach of the contract on our part. My reply to this was that I was not going to argue that aspect of the case. They claimed there was a breach and we were positive there was not; that we were both entitled to our opinions. He spent a considerable time telling me how he disliked our going to litigation and he wanted to avoid it if possible. My reply to this was that it was a commendable attitude—that we felt the same way. He then outlined the reasons why he considered there had been a breach. I stated I felt these were based on misinterpretation or possibly lack of knowledge of our contract rights and we still were positive there was no breach.

“He stated that furthermore they had made demand for Cummings’ compensation, on Wednesday, May 26, 1943, by sending two people to ask for his check and that it had not been given to them and that further that they had called the Treasurer of this corporation and asked for the check and were told there was no check since Mr. Cummings was on suspension. He stated that they had two girls in the office to take down this conversation with the ‘treasurer.’

“He outlined his proposition to us concerning which I stated that I, speaking for the studio, could not entertain. He stated there would probably be a lawsuit. Mr. Ward and I stated that we were very confident of our position, not only that we were legally correct, but that morally we had done everything possible to live up to the terms of the under- [157] standing that we had ostensibly reached with Mr. Cummings and Mr. Cummins a few weeks ago. He

(Testimony of Edward Muhl)

protested that Cummings was sincere when that understanding was reached. I stated I didn't doubt his sincerity, that I had considerable doubt as to his stability. I stated I thought his actions were somewhat childish and not on the plane of the understanding we had reached, and that while I did not include Cummins since he had assured me he did not know of Mr. Cummings' plan, that there had been a deliberate effort to entrap us in a legal situation to the end that Mr. Cummings would be relieved of his responsibilities under his contract with us.

"There was further discussion concerning matters not connected at all with Mr. Cummings and of a general nature. Before he left I asked him if Mr. Cummings had been in town during the period commencing May 18, 1943, and explained that my reason for asking him was that in the course of a conversation which I had with him over the telephone during the week ending May 29, 1943, relative to our possibility of needing him for a 'wild line' in Cummings' last picture, he had told me that Cummings would be in town on Friday or Saturday of that week, and clearly implied that at the time of that conversation, which was on Tuesday or Wednesday, that he was not in town. I stated at that time that if the wild line was shot it would be done on Tuesday or Wednesday of the following week. Mr. Cummins stated that Mr. Cummings had been in town and available during the period in question."

[158]

Q. By Mr. Cooper: Now, thereafter did somebody present to you a clipping from a newspaper? I will show this to counsel. Now, I show you a memorandum, with a clipping attached, and ask you if that was delivered to you by someone?

(Testimony of Edward Muhl)

Mr. Roth: If the court please, I would like to state my position on that. The conversation, of course, which the witness just finished was on June 3rd, and the other conversation was on June 1st, and they were all after the date of termination here. We haven't objected to them, because they are so close to the date of termination that they might be considered pertinent or material. This clipping referred to in the pleadings is a clipping from the Los Angeles Times, and the interchange department of the Army or Air Service, and they show on their face that they were received some time in July, long after the termination, at least a month and a half after the termination, and I don't see how they are permanent to an estoppel, and I am going to object that they are not pertinent to the defense of estoppel, and that they are not material, and are obviously hearsay, because this is a clipping from a newspaper, and is not evidence.

Mr. Cooper: If your Honor please, I am generally in accord with the view of counsel, and that anything that appears to have happened after the 3rd of June, generally speaking, is immaterial. However, counsel, in the stipulation of facts, wanted a stipulation as to the continued sending of the notices up to and including the present date, [159] and we want to offer this to show knowledge coming to the defendant corporation, as to why they continued to send the notices. That is the only purpose.

The Court: May I inquire upon what theory that is in the record, the fact that notices were continued to be sent?

Mr. Roth: Mr. Cooper just stated that counsel for plaintiff wanted to have these notices which were sent made a part of the stipulation. The only reason I agreed to it was because I thought counsel for the defense wanted

(Testimony of Edward Muhl)

it in the record. I have no theory with respect to the notices sent after May 29th or June 3rd. In other words, the notice of June 3rd is the last notice which is pertinent here.

Mr. Cooper: If your Honor please, if counsel will move to strike, then, any notice that may be detailed here, and not referred to in the argument, after June 3rd, I believe anything that happened after June 3rd, aside from admissions of fact and things of that sort would be immaterial.

Mr. Roth: I am not conceding that what happened on June 3rd is material. But for the purpose of this case I am not objecting to what occurred after June 3rd.

The Court: Let me interrupt to say that apparently you both are in accord on this proposition, that all the notices referred to in the stipulation of facts, or in the pleadings, as having been sent after June 3rd, 1943, may be stricken from the record?

Mr. Roth: That is satisfactory to the plaintiff. [160]

Mr. Cooper: That is satisfactory to the defendant.

The Court: That will be the order.

Mr. Cooper: May I just state this, for the purpose of the record, if your Honor please, to show the good faith in the pleadings, that we have a letter from an officer of the Army Air Corps—

Mr. Roth: There is no question of good faith involved.

Mr. Cooper: That is in the pleadings, may it please the court.

Q. By Mr. Cooper: Now, in this conversation of June 3rd there was some reference to a proposition. Had

(Testimony of Edward Muhl)

you had some previous discussion with Oscar Cummins with respect to a proposition? A. Yes.

Q. When was that?

A. That was sometime prior to June 3rd. I couldn't establish the date. There were a number of conversations between Mr. Cummins and myself.

Q. Was it before the telegram of April 10th was sent?

A. I believe it was after that time.

Q. Could you positively fix it between May 18th and May 29th? A. No, I couldn't.

Q. Did you make any record of that? A. No.

Q. From your best recollection, can you fix it, then, [161] between some points?

A. After April 10th and prior to June 3rd.

Q. That is the best you can fix that?

A. That is right.

Q. Why didn't you make a record or note of that?

A. The conversation was quite of a general nature, representing proposals that I didn't care to discuss specifically, relative to a change in the employment situation between Cummings and Universal, that we were not entertaining. They weren't of a very definite nature.

Q. Was there more than one conversation?

A. I think there was more than one conversation at which Mr. Cummins—

Q. Mr. Oscar Cummins?

A. Mr. Oscar Cummins—suggested, as I recall, some different kind of arrangement regarding the employment of Robert Cummings.

Q. What different kind of employment did he suggest?

A. One of the suggestions he made was that we go on a so-called picture basis, so that we would have a right to

(Testimony of Edward Muhl)

have one or two pictures with Robert Cummings, instead of having him under term contract.

Q. Did he explain to you the reason for that?

A. There were two reasons, as I recall. One was that a considerable amount or part of his time was going to be devoted or was expected to be devoted to this government [162] service, and that would leave him with only specified times to do pictures, and he didn't want to work exclusively for Universal, but wished to acquire the right to work for some other studio.

Mr. Cooper: You may cross examine.

Cross-Examination

Q. By Mr. Roth: Mr. Muhl, you have just testified to a conversation that you had with Mr. Oscar Cummins, the date of which is indefinite in your mind, but you fix it somewhere between April 10th and June 3rd?

A. That is my recollection. There was more than one conversation.

Q. When was the first of that series of conversations?

A. I can't fix it more definitely than I have.

Q. You wouldn't bunch them all up to say between May 29th and June 3rd, would you? A. No.

Q. Did any of them take place between April 10th and May 19th?

A. I can't state definitely. I think it is possible that they did. Mr. Cummins and I were sometimes in communication, and many things were discussed.

Q. Did any of them take place between May 19th and June 3rd?

A. It is possible. I can't fix it more definitely than I have. [163]

(Testimony of Edward Muhl)

Q. In any event, there were a series of conversations between April 10th and June 3, 1943, between yourself and Mr. Cummins, discussing the proposition that you have just outlined in your testimony?

A. Propositions of that nature—not a series—I wouldn't say a series—possibly two conversations or three conversations, but my recollection is more than one, and there might have been more than two.

Q. And did you discuss in all those conversations approximately the same things, that is, that Mr. Cummins said to you that arrangements might be made whereby Robert Cummings could do one picture for Universal, and the reason was that Robert Cummings was thinking of going into government work?

A. He had said before, and I knew, that Robert Cummings was in government work.

Q. But you have just testified that Oscar Cummins said to you in these conversations that the reason he was making those suggestions to you was that Robert Cummings was thinking of going into government work?

A. Yes, sir.

Q. Then you knew that Robert Cummings at that time was not in government work?

A. I knew he was in government work, but there could be a change in the situation with reference to his work with the government. [164]

Q. You had known, hadn't you, that Robert Cummings was in government work, for at least some months prior to April 10, 1943?

A. I knew he was in the Civil Air Patrol. I had seen him in the uniform of that organization.

(Testimony of Edward Muhl)

Q. Many times prior to April 10, 1943?

A. I think on only one occasion.

Q. But you knew he was in the Civil Air Patrol for some months prior to April 10th? A. Yes.

Q. Didn't you know that from Robert Cummings himself?

A. Yes; I had had conversations with him, and he told me some of his experiences.

Q. What specifically made you believe that he was permanently in the government service after April 10, 1943?

A. From the positive statements he made to Speers and Speers' report to me.

Q. And what else?

A. That is the principal reason.

Q. Are there any other reasons? Did you have any information, other than the report of Speers to yourself, that Robert Cummings was going to go into government service for the duration of the war, upon which you based your belief that he was actually in the government service?

A. Yes. There was a background from conversation between Oscar Cummins and myself for a period of time about [165] Bob Cummings' desire to go into government work.

Q. When did that background of conversations start?

A. During the whole period of time that Mr. Cummins and I discussed the affairs of the studio and Robert Cummings.

Q. When did it start?

A. I can't place it more definitely than that—some months prior to April 10th, and during the war.

Q. In this series of conversations that you had with Oscar Cummins between April 10, 1943, and June 3, 1943,

(Testimony of Edward Muhl)

did you ever ask Oscar Cummins specifically whether or not Robert Cummings was permanently in the government service?

A. I don't recall asking him specifically, no.

Q. You have also testified that you read this telegraphic notice of April 10th which was sent to—I will withdraw that—which at least was delivered to the telegraph office, which is in evidence here as Defendant's Exhibit A. Do you know the telegram I have in mind?

A. Yes.

Q. Why didn't you say in that telegram anything about the fact that you had heard he was going to be permanently in war work?

A. I didn't say so. That was an instruction to report.

Q. But you knew at the time, or you believed at the time, from what Mr. Speers had told you and from numerous conversations you had had with Oscar Cummins prior to that time, that Robert Cummings was going to be engaged in war [166] work?

A. I so believed.

Q. You also have testified that you read, before it was sent, the notice of April 15, 1943, the original of which I show you. That is your signature, isn't it, Mr. Muhl?

A. Yes, sir.

Q. Is there anything in that notice which indicates to Mr. Robert Cummings that he was suspended because of the fact that he was permanently enlisted in the armed forces of the United States or engaged in some other branch of war work?

Mr. Cooper: To which we object on the ground that it calls for a conclusion of the witness.

(Testimony of Edward Muhl)

The Court: It is engaging in an argument with the witness.

Mr. Roth: I will reframe the question.

Q. By Mr. Roth: The notice of April 15, 1943, Mr. Muhl, in the second paragraph thereof, advises Mr. Robert Cummings that "at the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit, the role of "Hank" in the photoplay now entitled "Fired Wife." And by reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to, and do, hereby exercise the further right granted to us under the provisions of said paragraph 12 of [167] the said contract to refuse to pay you any compensation until the completion of such role by such other person." Why didn't you elect to refuse to pay compensation, Mr. Muhl, until the termination of his service with the government of the United States?

A. May I see that, please?

Q. Yes.

A. This really states that we refuse to pay him any compensation during the period of his failure, refusal or neglect.

Mr. Cooper: The first paragraph you are referring to?

A. Yes.

Q. By Mr. Roth: And the reason, then, that you didn't state it specifically, is because you felt that the first paragraph covered it?

A. I think the letter covers it the way I wanted it. I read it and it seemed to me to cover the situation, and I think it does.

(Testimony of Edward Muhl)

Q. May I show you the letter of April 9th, which has been marked for identification? That letter of April 9th, which is Defendant's Exhibit C for identification, was prepared under your direction and supervision, was it not?

A. No, sir.

Q. Was it submitted to you? A. Yes.

Q. And you personally decided not to send it? [168]

A. Yes.

Mr. Roth: We offer the letter in evidence.

Mr. Cooper: May it have the same number?

Mr. Roth: Yes, it may have the same number. And I presume, on stipulation, it may now go in as Defendant's Exhibit C.

The Court: It will be marked in evidence as Defendant's Exhibit C.

[DEFENDANT'S EXHIBIT NO. "C"]

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 9, 1943

Registered Mail

Mr. Robert Cummings,
c/o Oscar R. Cummins, Esq.,
California Bank Building,
Beverly Hills, California.

Dear Mr. Cummings:

You have heretofore notified Mr. Robert Speers, by telephone, that you have enlisted in the Civilian Air Patrol

(Defendant's Exhibit C)

for the duration of the present war and will therefore be unavailable to us for the rendition of any service pursuant to your contract of employment with us dated November 21, 1938, as heretofore amended and extended. This is to notify you, therefore, that, commencing as of April 9, 1943, said contract of employment with us dated November 21, 1938, as amended and extended, shall be and is hereby suspended, both as to compensation and as to the running of the now current term of employment of said contract.

Nothing herein contained shall be construed as a waiver by us of any rights that we may have in the premises, either at law or in equity or under said contract of employment between us dated November 21, 1938, as amended and extended.

Very truly yours,
UNIVERSAL PICTURES COMPANY, INC.

By.....

Assistant Secretary

Edward Muhl
epw:vv

[Endorsed]: Case No. 3242-H-Civ. Cummings v. Universal. Defendant's Exhibit No. "C". Date: Jan. 5, 1944, for Identification. Date: Jan. 5, 1944, in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [246]

(Testimony of Edward Muhl)

Q. By Mr. Roth: Can you give us any explanation, Mr. Muhl, why you didn't make typewritten transcriptions of the conversations you had with Oscar Cummins between April 10th and June 1, 1943?

The Court: Did you withdraw the question as to why the witness neither dictated nor otherwise made any memorandum of any of those conversations?

Mr. Roth: I expect to ask this question first, and follow it up later.

The Witness: May I have the question read, please?

(Question read by the reporter.)

A. I can only say that it is my habit to make transcripts or memoranda of certain conversations that I think bear on important issues, and in a great many conversations I have I do not make them.

Q. One of the reasons I asked the question, Mr. Muhl, is because, apparently, at least, as far as my knowledge is concerned from what has been submitted for my inspection [169] from the files of your counsel, it is apparent that the first typewritten transcript of a conversation between yourself and Oscar Cummins is dated April 13, 1943. I show you the one from which you first read. According to your own testimony, there were other conversations with Mr. Oscar Cummins after that date on the same subject matter. According to your last answer, you considered the subject matter sufficiently important to make transcriptions of the conversations.

Mr. Cooper: Pardon me, counsel. If I understand the question correctly and if I understand the facts correctly, I object to the question on the ground that it is not a fair question.

(Testimony of Edward Muhl)

Mr. Roth: You can't understand the question, because you didn't permit me to finish the question.

Mr. Cooper: I humbly beg your pardon.

Mr. Roth: I will rephrase the question.

Q. By Mr. Roth: You did consider the subject matter of Robert Cummings, and everything that took place in respect of Robert Cummings, after the notice of April 10, 1943, an important subject, did you not?

A. Yes.

Q. And you did commence on April 13, 1943, to make a complete transcript or dictate the substance of all conversations that you had with Oscar Cummins after that date?

A. On April 13th I dictated the substance of a conversation had on that day, because the conversation seemed important to me.

Q. And the other conversations with Oscar Cummins did not seem important to you, and that is the reason you didn't dictate any transcript of them?

A. That is right. I didn't think any memorandum would be necessary for whatever conversations were held at that time.

Q. I understood you to testify that you didn't see the notice sent to you by Robert Cummings, which is dated May 29th, until some time after June 3rd.

Mr. Cooper: I didn't so understand that.

A. I don't recall so testifying.

Q. By Mr. Roth: Do you know what document I refer to when I refer to the notice of May 29th?

A. I think you are referring to the one sent by Cummings stating that, for certain reasons, the contract had been terminated.

(Testimony of Edward Muhl)

Q. When did you first receive that notice, or when was it first called to your attention? A. On receipt.

Q. When did you receive it, then?

A. The telegram will show exactly what time it came in. The telegram, I assume, is dated on May 29th.

Q. Did you have that telegram, or had you seen that telegram, before you had the conference with Mr. Oscar [171] Cummins, at which Mr. Ward was present, in your office, on June 3rd? A. Yes, I am sure I did.

Q. How long prior to that time had you seen it, before that time?

A. Three days, possibly four days.

Q. You had no knowledge, or did you have any knowledge, prior to the receipt of that telegram, that Robert Cummings intended to terminate his contract with Universal?

A. No, no direct knowledge. He had earlier tried to terminate his contract with us.

Q. That was prior to April 10, 1943?

A. Yes; that is correct.

Q. Had you instructed Mr. Dan Kelley to make transcripts of telephone conversations that he had with Robert Cummings, or with anyone else, pertaining to this case? A. No.

Q. Do you know that Dan Kelley made a transcript of a telephone conversation that he had with Mr. Benny Thau, of M-G-M, on May 28, 1943?

A. I was informed of that, yes.

Q. You have seen that transcript?

A. Yes, I had it. I haven't read it myself. I had it read to me.

(Testimony of Edward Muhl)

Q. You also made a transcript of a conversation on May 28th? A. That is correct. [172]

Q. Did you make any transcript of the conversations between April 13, 1943, and May 28, 1943, that you had with Robert Cummings or Oscar Cummins?

A. No, I don't recall any.

Q. Can you tell us why you made a transcript of the conversation on May 28th?

A. Because the studio—Mr. Kelley, when he spoke to me, was quite excited, and I suspected that something was going on, and I said there was one thing to do, "I will call Oscar and ask him directly," so I did, and on receiving his answer I dictated it, so that I would have a clear recollection of it when the matter came up for report to my superior officer and making other uses of it to which I might want to put it. It seemed clear and unequivocal to me, so I made a record of it.

Q. You testified that you had had differences with Mr. Cummings before? A. Yes.

Q. And they were adjusted? A. Yes.

Q. You knew on April 10th that there was a difference with Mr. Robert Cummings, did you not? A. Yes.

Q. Did you make a transcript of the conversation that you had with Bob Speers? A. No. [173]

Q. You have no memorandum or data of any kind in your file which shows that you had a conversation with Bob Speers on the date or about the date that you had it, or what was said between yourself and Bob Speers?

A. No.

Q. Nothing at all? A. No.

(Testimony of Edward Muhl)

Q. Between the time you had the conversation with Bob Speers and June 3, 1943, did you communicate with Robert Cummings directly in any way at all?

A. No.

Q. Did you attempt to investigate, or make a request to any official at Universal that Universal direct an investigation to be made as to whether or not Robert Cummings had signed up for the duration of the war with the Civil Air Patrol or with any branch of the armed forces of the United States or for any sort of government work?

A. What is that? Did I cause any investigation to be made?

Q. Did you cause any investigation to be made, or did you request any official of Universal to make such an investigation?

A. No.

Q. Now, Mr. Muhl, I think you have testified—I don't know whether I understood you correctly, so correct me if I state it improperly—that you had several conversations [174] with Mr. Oscar Cummins in respect of whether or not bonus payments on previous pictures were due?

A. I had such conversations.

Q. Several or one?

A. More than one.

Q. Can you mention the pictures on which those controversies took place?

A. No. The only thing that comes clearly to my mind was that a request was made once of me relative to a bonus that was accruing to Cummings for services in a Warner Brothers picture.

Q. Isn't that the only one?

A. No; I think there were others. And in addition to the bonus requests, Cummins frequently had recourse to me to discuss some aspect of Cummings' salary.

(Testimony of Edward Muhl)

Q. Any discussion that you had with Mr. Oscar Cummins on the question of salary, as distinguished from bonus, was always a discussion as to the amount that was due?

A. Yes, always the amount that was due, or whether the salary was payable for a certain period of time. There was a lay-off provision in the contract, and sometimes there would be a disagreement or failure to understand just what had been done as far as compensation was concerned, for particular periods of time.

Q. Had Oscar Cummins or Robert Cummings, or anyone on behalf of either of those two, ever, prior to April 10th, [175] come to you and complained that Robert Cummings or Oscar Cummins had appeared at the cashier's window at Universal to ask for his salary check, and there was no check there for them?

A. No, I don't recall any complaint on that subject.

The Court: May I interrupt to ask: When you gave that last answer, did you mean to imply that that subject was spoken of by Mr. Oscar Cummins to you?

A. Yes, your Honor, he did. I meant to convey this, that from time to time Mr. Oscar Cummins had discussions of salary matters and checks and sums due to Mr. Robert Cummings, and he would come to my office, after being dissatisfied either with the amount of the payment or there not being any check at the usual place when he called for it. That is my distinct recollection.

Q. You say he had come to you when there was not any check there waiting for him. Can you remember any specific instance in which that was done?

A. I can remember no date and no particular check.

(Testimony of Edward Muhl)

Q. Can you remember approximately the subject matter with respect to which it was, that is, a picture or a particular lay-off?

A. No, I can't remember the particular picture. I can't even remember all the pictures that Mr. Cummings has been in. But I do recall that the requests were made of me to straighten out a situation which resulted in a failure of [176] the check being ready on time.

Q. Well, we are agreed that the situation did occur in respect of at least one bonus check. Did it occur in respect of any checks that were not bonus checks, and where the difference of opinion was as to the amount of the check?

A. It occurred specifically—say some salary that wasn't paid for a period we considered lay-off, and that Mr. Cummins considered was not time properly taken as lay-off.

Q. Other than that lay-off incident to which you are now testifying, did it occur?

A. I can't refer to any other specific instances, no, sir.

Q. Can you particularize in respect to that lay-off period, and tell us when it occurred and what was said on the subject?

A. I can't tell you when it occurred without having recourse to our files, but the general situation surrounding it was this: Mr. Cummins was under the impression that by a previous schedule or agreement in the contract, that the minimum guarantee of salary payable had become 42 weeks instead of 40, as provided in the original contract, and when we concluded that the last two weeks was lay-off, he complained about it, stating that that wasn't

(Testimony of Edward Muhl)

according to the understanding, and there were several conversations about that; and it later was all resolved, and finally we granted that that might have been the correct understanding, and formalized that understanding in writing. [177]

Q. Now, Mr. Muhl, you signed an affidavit in this case? A. Yes, sir.

Q. Didn't you? A. Yes, sir.

Q. On the 3rd day of November, 1943?

A. I believe that is correct.

Q. And in that affidavit you referred to a conversation that you had with Oscar Cummins, and I direct your attention to it on page 2, line approximately 22, on March 28, 1943, in respect of this P. R. C. situation?

A. Yes.

Q. In your testimony this morning you fixed that conversation as May 28th instead of March 28th?

A. Yes, sir.

Q. The statement in your affidavit as to the date, then, is in error? A. That is correct.

Q. Do you have any data or memoranda in your files, which you have looked at since you signed this affidavit and swore to this affidavit, which has changed your mind as to the accuracy of the date? A. Yes.

Q. Where is that memoranda?

A. A copy of it is in my pocket. I believe Mr. Cooper has other memoranda of mine relating to the conversation,

(Testimony of Edward Muhl)

but I have also, since looking at my former conversations [178] and register of telephone calls, corroborated the date of May 28th instead of March 28th.

Mr. Roth: I presume, Mr. Cooper, I may look at that memorandum during the noon hour.

The Witness: I have also the secretary's register, if you would like to see that.

Q. By Mr. Roth: In this May 28th memoranda, the portion, I presume, that you refer to, is that, "He further stated that P. R. C., a producing organization that he had not heard of before, called him and asked about Cummings' availability."

A. I am not sure what you mean.

Q. I merely call your attention now to what you did say in your transcript of the conversation. A. Yes.

Q. Is it upon that, specifically, that you now are prepared to say that the date was May 28th and not March 28th? A. That is correct.

Q. Was that memoranda, Mr. Muhl, written up the same day you dictated it? A. Yes, sir.

Q. Did you read it before it was filed?

A. At least, that is my best recollection. If it wasn't written that day, it was written the next morning.

Q. After it was typewritten by your secretary was it placed in your files, or was it submitted to you and did you [179] read and correct it before it was placed in the files? A. I can't recall.

(Testimony of Edward Muhl)

Q. You have no recollection of whether or not you read it before it was placed in the files?

A. No, I don't. I could only answer that that would be my normal custom.

Q. You knew that that memorandum of May 28th, and the memorandum of April 13th, and the one on June 3rd, the transcript of Kelley's conversation with Benny Thau, of M-G-M, were in the files?

A. I knew there was certain memoranda in the files relative to those conversations.

Q. Did you refer to this memoranda before you signed this affidavit? A. No, I did not.

Q. You knew, of course, that Universal was in a lawsuit with respect to Cummings at the time you signed this affidavit, didn't you? A. Of course.

Q. Is there anything in your affidavit, to which I have directed your attention, and which you signed on the 3rd of November, 1943, which calls attention to the fact that you had a conversation with Bob Speers?

A. I think not, although I haven't looked at this.

Q. If there is any question in your mind as to whether or not there is, will you look at it? [180]

Mr. Cooper: I think the affidavit speaks for itself, and I am pretty sure there isn't.

The Court: That is, of course, I think a correct observation.

(Testimony of Edward Muhl)

Mr. Cooper: I will withdraw the objection.

The Court: This occurs to me: The witness being on the stand, at least he should be afforded the opportunity of making any explanation he desires.

Mr. Roth: May I add that Mr. Cooper, in his direct examination, took the opportunity of asking the witnesses for their explanation in advance of their testimony.

Mr. Cooper: I had it in my notes, and it was overlooked. I assure you that is a fact.

The Witness: May I have the question, please?

(Question read by the reporter.)

Mr. Roth: I will repeat the question. Is there anything in that affidavit which refers to any conversation you had with Bob Speers? A. No, sir.

Q. It is correct, isn't it, or is it correct, Mr. Muhl, because I understood Mr. Speers to testify to it yesterday, that when Mr. Speers told you about the conversation he had with Oscar Cummins you asked him to make a memorandum of that conversation? A. Yes, sir.

Q. And yet you didn't make a memorandum of your conversation with Mr. Speers? [181]

A. No, sir.

Mr. Roth: It is 12 o'clock, your Honor.

The Court: Yes. We will resume at 2 o'clock.

(Whereupon an adjournment was taken until 2 o'clock p. m., Wednesday, January 5, 1944.) [182]

2 O'clock p. m., Wednesday, January 5, 1944.

(Parties present as before.)

EDWARD MUHL

(Recalled.)

Cross-Examination

(Continued.)

Mr. Roth: If the court please, I think we can stipulate that during the noon recess I asked the secretary of Mr. Muhl, who is Edythe Rubens, to look at her notes and ascertain, if she could, on what dates between April 10th and June 3rd there were telephone conversations between Mr. Muhl and Oscar Cummins, and from out of her notebook she gave me these dates:

On April 13th there was a telephone conversation at 12:35. On April 14th—

Mr. Cooper: Pardon me, Mr. Roth. Were those incoming or outgoing calls?

Mr. Roth: I will have to give you more than that.

On April 13th, at 11:32, there was an outgoing call from Mr. Muhl to Mr. Cummins, which was not completed.

Mr. Cooper: That is Oscar Cummins?

Mr. Roth: Oscar Cummins. At 12:35 there was a call from Oscar Cummins to Mr. Muhl, which was completed.

At 12:16 on April 14th there was a call from Oscar Cummins to Mr. Muhl, which was completed.

At 12:50, the same day, there was a call from Mr. Muhl to Oscar Cummins, which was not completed. [183]

At 12:58 of the same day there was a call from Mr. Cummins to Mr. Muhl, which was completed.

(Testimony of Edward Muhl)

On May 5th there were two calls from Oscar Cummins to Mr. Muhl, which were completed, one at 3:46 p. m., and the other at 4:10 p. m.

On May 7th there was a call at 10:35 a. m. from Oscar Cummins to Mr. Muhl, which was completed.

On May 26th there was a telephone call, at 10:27, from Mr. Cummins to Mr. Muhl, which was completed. At 3:10 there was a call from Oscar Cummins to Mr. Muhl, which was not completed. At 4:20 there was one from Mr. Cummins to Mr. Muhl, which was not completed. At 4:50 there was one from Mr. Muhl to Mr. Cummins, which was completed.

On May 27th, there was a call from Mr. Muhl to Mr. Cummins, at 10:25 a. m., which was not completed. There was a call from Cummins to Muhl at 11:20 a. m., which was not completed. There was one from Mr. Cummins to Mr. Muhl at 12:25, which was not completed. And there was one at 2:13 p. m. from Mr. Cummins to Mr. Muhl, which was completed.

On May 28th there was a call from Mr. Muhl to Mr. Cummins at 10:06, which was completed.

On June 3rd there was a call from Mr. Cummins to Mr. Muhl, at 11:00 a. m., which was not completed. And at 12:32 there was a call from Mr. Muhl to Mr. Cummins, which was completed.

Mr. Cooper: We accept that stipulation, and may I [184] suggest to the court—

The Court: I assume that in each instance you are referring to Oscar Cummins?

Mr. Roth: In each instance I am referring to Oscar Cummins.

(Testimony of Edward Muhl)

Mr. Cooper: May I make this suggestion, that we offer that slip in evidence, so that we may refer to it, because I don't have that data.

Mr. Roth: I have no objection.

Mr. Cooper: With the court's permission, that will be the next exhibit in order?

The Court: That will become Plaintiff's Exhibit 2.

[PLAINTIFF'S EXHIBIT NO. 2]

	In	Out
Apr 13	12 35 X	11 32✓
14	12 16 X & 12 58 X	12 50✓
May 5	3 46 X & 4 10 X	
7	10 35 X	
26	10 27 X 3 10✓ 4 20✓	4 50 X
27	11 20 } ✓ 2 13X	10 25✓ & 6 28✓
	12 25 } ✓	
28		10 06 X
Jun 3	11 00✓	12 32 X
4	10 23 11 02	10 44

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Plaintiff's Exhibit No. 2 in Evidence. Date: Jan. 5, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [237]

(Testimony of Edward Muhl)

Q. By Mr. Roth: Mr. Muhl, between April 10th and May 29, 1943, did you have a conversation with Mr. Prinzmetal, of Metro-Goldwyn-Mayer?

A. I believe I did.

Q. On the subject of the services of Mr. Robert Cummings? A. Yes.

Q. Can you fix the date with more particularity?

A. I am inclined to believe it was in the latter part of that period. I can't be certain.

Q. Would you say it was in the latter part of April or the early part of May?

A. It might have been. I wasn't in my office at the time I received the call. [185]

Q. What was the conversation?

A. I talked to Prinzmetal from one of the offices of Loeb & Loeb. I was there on some kind of business.

Q. Very well.

A. Prinzmetal was inquiring as to whether or not, if they could get Cummings to do a picture for them, as to what position we would take in the matter, and he stated further, made some statement that inclined me to believe there was a possibility that that had either been discussed, or that something presented itself to his mind as a possibility that that might be accomplished, and, if it were, it might be a possible way of solving our then-present difficulty with Mr. Cummings.

Q. Did you tell Mr. Prinzmetal in that conversation that there was no possibility of getting Robert Cummings to do a picture, because he had signed up with the armed forces of the United States for the duration of the war?

A. No, I don't recall telling him that. I didn't initiate the conversation.

(Testimony of Edward Muhl)

Q. Well, irrespective of who initiated the conversation, did you tell that to Mr. Prinzmetal in any conversation? A. I don't recall it.

Q. Do you recall a meeting in your office some time between April 10th and May 29th, 1943, between yourself, Oscar Cummins and Bob Speers?

A. No, I don't; I don't recall. I remember a meeting [186] at which Mr. Cummins and Mr. Speers were present, in my office, but I can't place the time.

Q. In any of the conversations you had with Oscar Cummins between April 10, 1943, and June 3, 1943, in which an adjustment of this contract, I understand, was spoken of, or an adjustment of the situation was spoken of, did you say to Oscar Cummins that there was no use talking about an adjustment of the situation, because Robert Cummings had signed up with the armed forces of the United States for the duration of the war?

A. No. I recall that—

Q. That is an answer to the question.

Mr. Cooper: If your Honor please, the witness has a right to explain.

Mr. Roth: Well, if the witness or the court feels that an explanation is necessary, I am willing to have him explain.

The Court: May we have the question and the answer read?

(Record read by the reporter.)

The Court: Do you desire to explain your answer?

A. Yes; I wanted to explain why that didn't come up. It was well known to—

(Testimony of Edward Muhl)

The Court: Well, I don't think that is an explanation of the answer. The purpose of an explanation to a witness' answer is to make clear the meaning of his answer, lest it be construed in some manner different from that intended by the witness. [187]

Mr. Roth: I have no further questions.

Redirect Examination

Q. By Mr. Cooper: Referring to your affidavit filed in this court, dated November 3, 1943, and directing your attention particularly to that portion of the affidavit wherein it is stated that on March 28, 1943, at or about 10 a. m. of said day, "I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it," and particularly directing your attention—well, I had better read it all so you will get it clearly—reading from the affidavit: "That I heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that PRC, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him. He asked me what had disturbed me about it and I replied that I wasn't disturbed, but that I had wanted to know if anybody had suggested to M-G-M that Cummings' suspension had been terminated." On March 28, 1943, was Robert Cummings on suspension? A. No. [188]

(Testimony of Edward Muhl)

Q. Was he on the payroll?

A. He was on the payroll at that time, in that period, around that period.

Q. Did you yourself dictate this data? A. No.

Q. You, however, did read it before you signed it?

A. Yes.

Q. The affidavit was prepared by whom?

A. Ben Erlich.

Q. An attorney at the studio? A. Yes.

Q. Did you give him all of the information contained in here, or did you make any suggestion to him? Did you give him all of the information contained in this affidavit?

A. I either gave him the information or asked that he consult the files with reference to certain facts and dates which should be a part of that instrument.

Q. Now, it appears that—

The Witness: May I have Plaintiff's Exhibit 2, please?

Q. —in addition to the telephone calls that you told us about this morning on direct and cross examination, there were some other conversations? A. Yes.

Q. Before you testified this morning had you consulted your secretary with respect to any other dates than those you testified about this morning? [189]

A. No, I didn't.

Q. Was your testimony this morning your best recollection at that time? A. Yes, sir.

Q. Can you recall any conversations between the period of April 13, 1943, and June 3, 1943, on any other subject other than that discussed by you this morning?

A. I have a recollection, which has been reinforced from an examination of the file—

(Testimony of Edward Muhl)

Q. What file do you refer to?

A. —our studio file there, copies of letters and so forth, that the conversation or conversations that took place on the 14th were relative to a question of some compensation that it was contended was due Mr. Cummings.

Q. Did you turn that matter over to someone else?

A. Mr. Ward handled the matter ultimately to its conclusion, yes.

The Court: May I interrupt? You used the expression "the 14th." To what month do you refer?

A. April 14th.

Q. By Mr. Cooper: Can you recall any other subject matter that you discussed in any of these conversations, other than that?

A. I had reference previously to a conversation relative to a proposal for us to accept something less than our rights under the then-current contract. [190]

Q. Taking into consideration the information you received from Bob Speers with respect to this telephone conversation with Robert Cummings on April 5th, the notice sent to Robert Cummings on April 10th, the fact that he did not appear on April 12th, and from all of the conversations you had with Oscar Cummins, did you still believe, between the period of April 12, 1943, to and including the receipt of the notice of May 29th, that he was devoting one hundred percent of his time to the Civil Air Patrol and would not be available to you for services?

(Testimony of Edward Muhl)

Mr. Roth: That is objected to, your Honor, as calling for an opinion of the witness as to his state of mind, and asking the witness to decide one of the questions which the court has to decide in this case.

The Court: I think we indicated yesterday that, outside of a criminal case, where a man's intent is involved, he may not answer a question like that.

Mr. Cooper: I understand that, but I still respectfully disagree with the court.

Mr. Roth: I take it that the objection is sustained?

The Court: Yes.

Q. By Mr. Cooper: Did anything come to your knowledge between April 12, 1943, from any source whatsoever, between April 12, 1943, and May 29, 1943, that Robert Cummings was ready, able and willing to perform the services under his contract? [191]

Mr. Roth: I object to that on the ground that it calls for a conclusion of the witness and asks this witness to decide the question the court is going to have to decide as a matter of law.

The Court: Let me interrupt to say that I am inclined to think that it is a short-cut.

Mr. Cooper: It is a short-cut, for this reason: There are to be other conversations, if your Honor please, and I don't know what all of them were, and I don't know what may come up, and for that reason, if your Honor please—

The Court: It seems to me that this is one of the principal probative facts which will require a finding. I am

(Testimony of Edward Muhl)

unable to see upon what basis the witness should be allowed to determine it.

Mr. Cooper: That is a very good suggestion, I believe.

Q. By Mr. Cooper: During any of these conversations between April 12, 1943, and May 29, 1943, did Oscar Cummins or Robert Cummings tell you that he was willing to work? A. No.

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial, and outside the issues of this case, and not proper redirect examination, and it calls for the opinion of the witness on a question of law.

The Court: I think, strictly speaking, the interrogation is not redirect, but I am prepared to allow counsel to reopen the direct examination, and I think it may fairly be [192] said to ask the witness whether, in the course of any of these conversations, either the plaintiff or Mr. Oscar Cummins stated in words or in substance that the plaintiff was willing to work for the defendant. There might be other criticisms, but I think, having gone over the ground as extensively as counsel have, that I should allow that.

Mr. Cooper: I think there is an answer already in to that question.

(Record read by the reporter.)

Q. By Mr. Cooper: In substance or in effect?

A. No.

Mr. Cooper: I think that is all.

Mr. Roth: No further questions.

Mr. Cooper: Mr. Ward, please. [193]

EMMETT WARD,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Emmett Ward.

Direct Examination

Q. By Mr. Cooper: Mr. Ward, what is your business or occupation? You are employed by whom?

A. Universal Pictures Company, Inc.

Mr. Roth: I don't hear you.

A. Universal Pictures Company, Inc.

Q. By Mr. Cooper: How long have you been employed by Universal? A. Since 1934.

Q. In what department of that corporation?

A. Since the start of my employment—

Q. For the past couple of years?

A. In the contract department.

Q. The head of that department is whom?

A. Mr. Muhl.

Q. Do you know Oscar Cummins?

A. Yes, I do.

Q. How long have you known Oscar Cummins?

A. I would say four or five years.

Q. Have you seen him in the studio frequently?

A. Yes. [194]

Q. Did you know him as the agent of Robert Cummings, the plaintiff in this case?

A. I knew him as the representative of Robert Cummings, the agent.

Q. Have there been any occasions that you know of when Oscar Cummins came to you respecting the non-

(Testimony of Emmett Ward)

payment of salary under his contract of November 21, 1938? A. Yes.

Q. Do you recall any specific occasions?

A. I recall one occasion specifically, although I can't recall what date it was.

Q. Do you recall approximately how long ago it was?

A. Oh, a year or so ago. I recall that he came into the office and said that he had been to the cashier, and there was a bonus check, a salary check, that was not ready, and asked if I would locate it for him.

Q. What did you do?

A. I called the paymaster and started to tracing the check, and he said it had been made out late. The checks, I believe, at that time were presently in the controller's office waiting for signature, and Mr. Cummins sat in my office until the check was sent for, and I handed it to him.

Q. What did he do with it?

A. He stood up and folded the checks and put them in his pocket, and shook hands and thanked me for getting them for him. [195]

Q. On or about April 14th or 15th of this year did you have some discussion with Oscar Cummins about a check that was or was not due to Robert Cummings?

A. Yes, I recall such a case.

Q. Was that a phone conversation or a conversation personally?

A. As I recall, it was a telephone conversation.

Q. Do you recall what date it was?

A. Not exactly, but I recall that it was pay day, so it must have been Wednesday.

(Testimony of Emmett Ward)

Q. After having that conversation with him did you dictate a letter?

A. Subsequent to the conversation, yes, but I think it was the day after the conversation.

Q. For the purpose of refreshing your memory as to the date, I show you a letter. I will first show it to counsel. I show you a carbon copy of a letter, and ask you if that refreshes your memory as to the date?

A. Yes.

Mr. Roth: We will stipulate that the letter may be read in evidence.

Mr. Cooper: Thank you. It is dated April 15, 1943:

"Mr. Oscar Cummins,
9441 Wilshire Boulevard,
Beverly Hills, California.

Dear Oscar: [196]

Enclosed I am sending you our check in payment of Robert Cummings' salary for two days of last week. We are very sorry that this error in payment of Mr. Cummings' salary took place.

Sincerely yours,

Emmett P. Ward,
for Universal Pictures Co., Inc."

Q. Now will you relate the conversation that you had with Oscar Cummins on the telephone preceding the sending of this letter of April 15th?

A. As I recall it, he called to tell me that Robert Cummings' salary check for the preceding week had been picked up and it was two days short, and would I check it and find out why, and I said that I would.

(Testimony of Emmett Ward)

Q. By Mr. Cooper: Had you in fact ordered Bob Cummings suspended before April 12, 1943?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, and no proper foundation laid, and no showing that this witness had authority to suspend him.

The Court: I think he may testify as to what he undertook to do.

Mr. Cooper: Yes.

A. I had notified the payroll to take him off salary, that he was going on suspension.

Q. On what date was that?

A. The suspension was to commence from the 9th of April. [197]

Q. That was the date you dictated that letter of April 9th that is now in evidence?

A. I believe so. It was a letter of April 9th.

Q. When Oscar Cummins phoned you did you make some change with respect to his being on suspension as of the 9th?

A. Between the time I told the payroll he was on suspension as of the 9th and the time Oscar Cummins phoned me, there had been a change made in the plan for the suspension, which I neglected to notify the payroll of.

Q. As a matter of fact, he was not put on suspension dating as of the 9th? A. No.

Q. And you paid him his check for the 9th?

A. And 10th.

Q. And 10th? A. Yes.

Q. That was the check referred to and enclosed in the letter of April 15th? A. That is correct.

Mr. Cooper: I do not want to repeat something, but, with the court's permission, I would like to ask a question.

(Testimony of Emmett Ward)

Q. Were you present at a conversation in Ed Muhl's office, at which time there was present Oscar Cummins, on or about the 3rd day of June, 1943?

A. I was present at such conversation, but the exact date I don't recall. [198]

Q. Do you have an independent recollection of the substance of that conversation? A. Yes, I do.

Q. Will you state the substance of that conversation on June 3rd?

A. Well, as I recall it, I came in a little late on the conversation, and, briefly, Oscar Cummins said he wanted to try and arrive at some kind of a compromise settlement of the difficulties presently existing between the company and Robert Cummings on the suspension.

Q. Is that all that you can recall of the conversation at this time?

A. Well, he did mention that he had been consulting another attorney besides himself and his brother, and that they had been advised that there had been a breach of the contract, and Bob had a good legal action for voiding the contract.

Q. Anything else that you recall?

A. Not offhand.

Q. If I showed you a memorandum of that conversation of June 3rd, do you think that might refresh your recollection as to the subject matters discussed?

Mr. Roth: If the court please, the witness testified from his memory. Mr. Muhl made the memorandum, and if counsel is expecting to ask the witness to testify, we object to the memorandum being shown to the witness. [199]

Mr. Cooper: It doesn't make any difference.

The Court: I think the objection is well taken.

(Testimony of Emmett Ward)

Q. By Mr. Cooper: Is there anything else that you recall that occurred in that conversation?

A. Well—

Q. Do you recall the word “entrap” being used?

A. Yes.

Q. Tell us what was said about that.

A. I think Mr. Muhl told Oscar Cummins that—I forget who it was—but somebody had deliberately set about to legally entrap the studio into a position where we would have to make some compromise on the contract that Mr. Cummings had with the studio.

Q. What did Mr. Oscar Cummins reply to that, if you recall?

A. I think he denied having anything to do with it himself.

Mr. Cooper: You may cross examine.

Cross-Examination.

Q. By Mr. Roth: Mr. Ward, this incident you referred to in your direct examination, which took place a year or more ago, when Mr. Cooper asked you about the check or checks that were due to Robert Cummings, are you sure that was not just a bonus check?

A. I am quite sure it was two checks, and involved a bonus check and a weekly salary check. [200]

Q. Do you remember with respect to what picture the check was involved? A. No, I don't.

Q. Was it a phone call, or did he come there?

A. Mr. Cummins was in the office at the time.

Q. And you talked to the paymaster, or sent somebody and got hold of the checks?

A. Yes; I located the checks.

Q. Did you look at them before you handed them to Mr. Cummins?

(Testimony of Emmett Ward)

A. I probably gave them a very cursory inspection.

Q. Was that the only time that Mr. Cummins spoke to you about a check?

A. As I recall, that occurred quite often. That is just one incident that stands out in my mind.

Q. Did it ever happen before in respect of a salary check, as distinguished from a bonus check?

A. I would say it did.

Q. But you have no recollection of when?

A. I have no recollection of any specific incident, no.

Q. Would you say it did between the time you gave him the salary check and the bonus check and April 10, 1943?

A. I believe it probably did. I would say it did.

Q. Between the time that you testified that you handed him a salary check and a bonus check and April 10, 1943?

A. I think I answered the question. I understand by [201] his question he means, did Mr. Oscar Cummins, between the incident I related of handing him a salary check and a bonus check and April 10, 1943, if, at any time, it occurred again that he came in to ask me for a check for Bob.

Q. Is that correct?

A. And my answer was that, to the best of my recollection, it did. Quite often Oscar would be in talking to Ed Muhl, and would come out into my office and say, "Get me Bob's check. See if you can get me Bob's check." It may have been a day late from pay day, or something like that.

Q. You mean it happened in that manner?

Q. Quite often it happened that way.

Mr. Roth: That is all.

Mr. Cooper: That is all. Mr. Kelley, please. [202]

DANIEL KELLEY,

a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Kelley, yesterday afternoon Judge Roth asked you a question with respect to the date of a conversation you had with Benny Thau and Mr. Fred Datig. It is my recollection that you testified that it was on or about the 1st of June. Have you since refreshed your memory as to the actual date of that conversation? A. I have.

Q. Let me ask you this first: Is it a matter of practice in your own office, I mean your personal office, to make a record of certain telephone conversations?

A. Yes.

Q. And with whom or on what calls do you make such a record?

A. Because ninety percent of my business is done over the telephone, on contracts and business dealings, and I want a record of it so that I will have a thorough understanding of it afterwards.

Q. And do you have someone listen in on an extension wire?

A. I have my secretary take down transcriptions of the messages, so that there is no misunderstanding. I make lots of contracts over the telephone or okay deals over the [203] telephone. That is the reason why all telephone calls to my office are taken down by my secretary.

Q. Was that done in the case of your conversation with Mr. Fred Datig and Mr. Benny Thau?

A. It was.

(Testimony of Daniel Kelley)

Q. I show you a transcription of your telephone calls, in question and answer form, and, directing your attention particularly to the date, on what date did you have phone conversations with Mr. Fred Datig?

A. One on May 27th, and one on May 28th.

Q. And with Mr. Benny Thau?

A. May 28th.

Mr. Cooper: That is all. You may cross examine.

The Court: Just a moment. Mr. Reporter, will you read the last two questions and answers?

(Record read as requested.)

Mr. Cooper: One other question. May I inquire of the court and counsel: It is my recollection, if your Honor please, that when this witness was on the stand yesterday on cross examination counsel inquired of the witness as to the substance of the conversations with either one or both of these gentlemen. Does your Honor have a recollection of that, or do you remember it?

The Witness: I do. He asked me if I had a conversation with anybody away from the studio, and if I was asked if we would lift the suspension, and if this was during the time [204] of the making of "Fired Wife," and I said no, it was not while we were making "Fired Wife."

Mr. Cooper: If your Honor please, the point of my inquiry is this: It is my recollection, although I am not positive, that counsel inquired of the witness as to the substance of these conversations, and if I am right in that recollection it is my desire now to offer the entire conversations, as the witness has now refreshed his recollection particularly as to specific details.

(Testimony of Daniel Kelley)

Mr. Roth: Of course, the witness is partly right. What I did ask the witness in several forms was, and in response to one or two questions, the witness specifically said, "In that form, no. If that is the question, the answer is no." That is the effect of what he said. But my question was not as to "Fired Wife." My question was, if this witness had at any time been asked by anyone generally with respect to the services of Robert Cummings, whether he had been asked by anyone connected with a studio whether Universal would lift the suspension of Robert Cummings if they could persuade him to do a picture for them. That was the effect of my question, and the witness answered the question no. Anyway I put it, he answered it no.

Mr. Cooper: If your Honor please, it would be my first suggestion to ask the reporter to read back that portion of it, but in the interest of time I offer this suggestion, [205] that I offer these three conversations in evidence as redirect examination, provided my recollection of counsel's cross examination is correct, and that I offer it in evidence subject to the reporter checking that situation.

The Court: Well, in order to avoid having this witness return, and having in mind that one or both counsel will check with the reporter's notes, could the memoranda be left here, so as to render it unnecessary for the witness to return?

Mr. Roth: I think so. I am not at this time stipulating that I will not raise other grounds of objection.

The Court: No, I am not asking that, but it occurred to me, for example, that if the objection is ultimately overruled, the witness could be asked to relate the conver-

(Testimony of Daniel Kelley)

sation, upon the basis, apparently, that his answer would be as set forth in the memorandum, and for that purpose it would be unnecessary to recall him.

Mr. Roth: Yes, your Honor, except for this one thing: In respect of other memoranda, I think, by reason of my stipulation, the memoranda have been permitted to be read into evidence as the testimony of the witness, on the theory that the witness would testify that it was his memorandum. Generally speaking, I don't understand that that is the proper procedure. If memoranda have been made after the date of a particular conversation and the court sees fit to grant permission, the witness may use the [206] memoranda to refresh his recollection and testify to the conversation, but that doesn't mean that you may substitute the memoranda for his testimony.

Mr. Cooper: I agree that that is the rule.

The Court: I don't think there is any quarrel on that point.

Mr. Roth: The only reason I bring that up here is that with the other witnesses I have been satisfied to proceed in that manner. I am not satisfied, and my mind isn't made up on the subject as yet, as to whether or not I would permit, without objection, the reading of this memorandum into evidence in lieu of having Mr. Kelley testify to what took place. I might.

Mr. Cooper: I would suggest this procedure, then, if your Honor please.

The Court: Let the witness remain until the mid-afternoon recess, and plaintiff's counsel might examine the memoranda and then state his position.

Mr. Roth: That is all right. I would be glad to do that.

(Testimony of Daniel Kelley)

Mr. Cooper: Thank you, your Honor. I would have no further questions other than those to address to the witness.

Cross-Examination

Q. By Mr. Roth: You testified that it was your custom to have telephone conversations transcribed when you had matters relating to contracts to discuss. [207]

A. Business matters.

Q. And that ninety percent of your conversations over the telephone pertained to contract matters?

A. To business.

Q. Are ninety per cent of your telephone conversations transcribed?

A. All of them applying to business are transcribed. No personal calls are transcribed.

Q. All of your telephone conversations pertaining to business are transcribed? A. Yes.

Q. Did you mean for us to understand that ninety per cent of your conversations on the telephone do pertain to business? A. No, I didn't say that.

Q. That is the reason I am asking you now.

A. No.

Q. What percentage of your telephone calls do pertain to business?

A. I wouldn't know, because one day it will be more than it will another day. Some are personal calls and some are business calls.

The Court: Let me interrupt to say that there is something confusing about one of your answers. Did you use the expression "ninety per cent"?

A. I said something about ninety per cent of my [208] contracts are O.K.'d over the telephone. I think ninety

(Testimony of Daniel Kelley)

per cent of the contracts are ultimately O.K.'d on the telephone. I think that is what I said, because I get an O.K. and call up and give an O.K., because I have to have an approval too.

Mr. Roth: If your Honor please, I didn't write the witness' testimony down as he gave it, but my recollection is that it was broader than that.

The Court: I was under the same impression, and that is why I asked the witness there what he meant, and the witness has now given another explanation.

Mr. Roth: It is my recollection that the witness testified that ninety per cent of his telephone calls related to business.

The Court: I thought I had so understood, and then when the witness last answered plaintiff's counsel he didn't seem to mean that.

Q. By Mr. Roth: Let us put it this way so that we will get your testimony in the record as you would have it. What percentage of your telephone calls do relate to business?

The Court: In the course of a month or six months' period?

A. I would say ninety per cent of my calls are business.

Q. By Mr. Roth: Are ninety per cent of your calls transcribed? [209] A. They are.

Q. Who transcribes them?

A. Two secretaries, either one or the other.

Q. In other words, every time you get on the telephone a girl listens in and takes down the conversation?

A. That is correct; if it is business, she takes it. If it is personal, she does not.

(Testimony of Daniel Kelley)

Q. Do you have a file of your telephone conversations? A. I have.

Q. Do you have it here?

A. A file of all of them?

Q. Yes. A. No, I haven't.

Q. Do you have a file of the telephone conversations separately by months?

A. They are filed in a looseleaf book file, and when that is filled she takes it in on my private desk. Those telephone conversations are in my desk.

Q. You call the girl in after you have completed the telephone conversation? A. I do not.

Q. Do you know whether the girl writes it up immediately after she listens in on the telephone conversation? A. That I don't know.

Q. Do you know when the girl types up the conversation, with respect to the time—that is, assuming that you have [210] a telephone conversation now, when would you expect the girl who listens in to actually type it up?

A. I think she types it up immediately after, if she has the time.

Mr. Cooper: The girl is here, if that will help you any.

Mr. Roth: Yes. I asked that because I saw Mr. Kelley come in with a young lady, and I am, of course, examining Mr. Kelley now and getting his knowledge of the circumstances and what is done.

Q. By Mr. Roth: Are these transcriptions submitted to you after they are written up?

A. They are not.

(Testimony of Daniel Kelley)

Q. You never see them?

A. I never ask for them unless something comes up for inspection, or very seldom do I ask for them.

Q. In other words, they are written up and filed away without being shown to you? A. Yes.

Q. And you do not refer to them unless, in a situation like this, it occurs to you or counsel to look up certain dates, to see whether or not you had a telephone conversation? A. That is correct.

Q. When did you look for the memoranda which are dated respectively May 27th and May 28th?

A. Last night when I got back to the studio. [211]

Q. Did you make the search yourself?

A. I did not. Mr. Erlich and my secretary, when I was out of the office.

Q. Then you haven't seen these memoranda since the time you had the telephone conversations?

A. I don't believe I have, until last night.

Q. Until last night? A. That is correct.

Mr. Roth: If the court please, I respectfully submit that the answers of the witness show that this memoranda cannot be used, and it is not admissible even for the purpose of refreshing his recollection.

Mr. Cooper: May I take the witness, your Honor?

Mr. Roth: On this phase of the examination, for the purpose of having the court determine my objection, I think we have established that this witness never saw the memoranda after it was made and had no opportunity to check it back, that it wasn't made under his direct supervision and under his control, and that he is looking at the memoranda for the first time about a conversation which took place several months ago. And the entire reason

(Testimony of Daniel Kelley)

behind the rule is that it shall be made by the witness and that he has had an opportunity to check it at the time it was made.

The Court: I think I should allow opposing counsel a chance further to interrogate the witness.

Mr. Cooper: I would like to make this observation first, [212] that I do not agree with counsel's statement of the rule. For example, at the present time this reporter is taking down the testimony of the witness and the remarks of counsel and the court, and neither the court, and certainly not the witness, has an opportunity to correct it; nevertheless in any subsequent proceeding the witness would be permitted to refresh his memory from a transcript of it.

Q. By Mr. Cooper: If you looked—I think you have looked at those three transcripts—would that refresh your recollection as to the conversations you had with Mr. Datig and Mr. Thau respectively?

A. They do.

Mr. Cooper: That is the only question I have, your Honor.

The Court: Having in mind that we have reached this stage in the interrogation of the witness as far as these conversations with Messrs. Thau and Datig are concerned, it would seem that all that remains to be determined is whether or not the witness may refer to them for the purpose of refreshing his recollection. I would like to suggest that counsel might proceed to at least complete the balance of the cross examination, leaving for further determination whether or not the witness may resort to the memoranda.

(Testimony of Daniel Kelley)

Q. By Mr. Roth: Did you know, when Mr. Datig called up, Mr. Kelley, that he was going to discuss a matter of business with you? [213]

A. That is the usual procedure when I get a call from Mr. Datig, from another studio, that we assume that it is going to be business.

Q. Every time someone calls you from another studio, you assume that it is business, and you have the girl get on the telephone and make a transcription of the conversation?

A. That is left to the discretion of my secretary, as to whether she makes it or not. If it is personal, she doesn't take it, but I have left that up to her.

Q. You have your secretary, or one of them, come on the telephone and listen with you all the time, and if she decides that it is a personal conversation, she makes no memoranda of it, and if she decides it is a business conversation she does make a memorandum of it?

A. I would say that is the rule.

Q. Have you and your secretary discussed at any time at what part of the conversation she is to make up her mind whether it is business or personal?

A. I haven't, no, sir.

Q. In other words, you leave it entirely to your secretary from the beginning to the end of the conversation?

A. I do.

Mr. Roth: Could I ask counsel to bring in for my inspection the record of telephone calls, incoming and outgoing, between Mr. Kelley and anyone, for the month of May, [214] 1943, and the records of the transcriptions made of telephone conversations during that month?

(Testimony of Daniel Kelley)

Mr. Cooper: I would like to inquire first. I assume they have it.

The Court: You might do that.

Mr. Cooper: Counsel, you stated that you would be happy to get that. They do not have a record of outgoing calls, but they have a record of all incoming calls.

Mr. Roth: Well, I will take what records they have, just for my inspection, for that particular month. I would like to ask Mr. Kelley this additional question.

The Witness: Can I ask you a question?

Mr. Roth: I don't mind, if the court doesn't mind.

The Court: I am not sure what your purpose is.

The Witness: I want to ask whether he wants to know what the conversations were that I had, that I had transcribed.

The Court: You want to know the purpose of making the inspection?

The Witness: No. I would like to know whether he wants to learn the conversations I have had, all the conversations which I had. I want to know if that is his purpose.

The Court: Merely to find out what was transcribed, what you said?

The Witness: Yes. [215]

Mr. Roth: Obviously, your Honor, I can answer that. I haven't the slightest curiosity or interest in Mr. Kelley's business. My sole purpose in making the check is to see

(Testimony of Daniel Kelley)

how accurate and complete it is and whether or not it coincides with the witness' oral testimony.

The Court: Does that clear the matter in your mind?

The Witness: Well, there are conversations every day which are taken down and transcribed, for the last three or four years, in my office, and I was just wondering whether it was something that would be made public, as far as the conversations were concerned.

Mr. Roth: I can see that there is some point in the witness' suggestion. There may be confidential matters there that he wouldn't want anyone to see or disclose, and I haven't any desire to pry into any business of Mr. Kelley or Universal. My sole purpose is the one I stated. Suppose we do this, your Honor. During the noon hour, the noon recess, I will give this matter some thought, and I may withdraw the request.

The Court: That is, the mid-afternoon recess?

Mr. Roth: Yes, the mid-afternoon recess.

Mr. Cooper: She is calling now to get them ready.

Mr. Roth: I have no further questions from this witness.

Mr. Cooper: I think that is all. I would like to call Mr. Robert Cummings under Section 2055.

The Court: May I suggest to counsel that, under Rule 43, [216] subdivision (b) of the Federal Rules of Civil Procedure, you have all the leeway that Section 2055 provides.

Mr. Cooper: Thank you, your Honor. I will be very happy to call him under that section. [217]

ROBERT CUMMINGS,

the plaintiff, a witness heretofore duly called in his own behalf, upon being called as a witness for defendant, under Rule 43, subdivision (b), testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Cummings, when did you first join the Civil Air Patrol?

A. I can't give you the exact date, Mr. Cooper. I should say I sent the forms in to Washington some month and a half or two months after Pearl Harbor.

Q. You have engaged in active service in the Civil Air Patrol, have you not? A. No.

Q. None at all? A. No.

Q. Have you done any flying at all in Los Angeles County? A. No.

Q. Were you permitted to fly in Los Angeles County?

A. Yes.

Q. Have you done any flying outside of Los Angeles County? A. Yes.

Q. When was the last time you flew outside of Los Angeles County before, we will say, June 1st of this year?

A. Before June 1st of this year?

Q. Yes. [218]

A. I can't tell you. I could look it up.

Q. Let's put it this way: Where did you fly outside of Los Angeles County?

A. Where I have flown prior to June 1st of this year?

Q. Yes.

A. Las Vegas, Nevada, Quartzsite, Arizona, Phoenix, Arizona. That is all I recall.

(Testimony of Robert Cummings)

Q. Can you recall when it was that you were flying in Quartzsite, Arizona, approximately what month? Can you fix the month?

A. No, I can't definitely fix the month. I could look it up in my aircraft log, however, and in my pilot log, which states the days, hours and minutes I flew.

Q. Do you recall flying during the month of May?

A. I can't definitely say that I do.

Q. Do you know where you were between, say, the first of May and the first of June?

A. I can't say right now. I could tell you by my aircraft log.

Q. Your aircraft log is where?

A. That happens to be at Oxnard, California.

Q. Could you call there and get that information?

A. No; there is no way I could phone. I would have to go there and get the log and bring it back.

Q. Were you in Los Angeles on the 10th of April, 1943? A. I couldn't swear to it. [219]

Q. Or on the 11th of April, 1943?

A. That I couldn't swear to either.

Q. Or on the 12th of April, 1943?

A. That I couldn't swear to.

Q. On the 18th day of May, 1943?

A. That I don't remember.

Q. The 19th? A. I don't remember that.

Q. The 20th?

A. The only way I could tell would be to look it up in the aircraft log, and I could tell where I was, and what ship I was flying, and where, on that day.

Q. Were you in town on May 29, 1943, in the town of Los Angeles? A. That I do not remember.

(Testimony of Robert Cummings)

Q. Did you have a conversation with Oscar Cummins at any time on the 29th of May, 1943?

Mr. Roth: That is objected to incompetent, irrelevant and immaterial, and asking for a confidential communication.

The Court: I think the question, in its present form, is purely preliminary.

Mr. Cooper: That is all it is, if your Honor please.

The Court: And he may answer.

Mr. Cooper: You may answer the question.

The Witness: Would you state the question again?
[220]

Mr. Cooper: Will you read it, please?

(Question read by the reporter.)

A. It is very possible, but I couldn't recall.

Q. By Mr. Cooper: Do you recall whether you were in Los Angeles on May 29, 1943?

A. I am sorry, I don't.

Q. For the purpose of refreshing your recollection—it seems as though we are refreshing everybody's recollection—I show you a telegram. Counsel, you have seen this telegram?

Mr. Roth: Yes.

Q. By Mr. Cooper: I show you a telegram dated May 29, 1943, and ask you if you have ever seen—I will withdraw that question. I will ask you to read the telegram. A. Aloud?

Q. No,—to yourself.

Mr. Cooper: That, if your Honor please, is the notice of May 29th, which the witness is referring to.

Mr. Roth: It is admitted that it was received. I don't see the materiality of it.

(Testimony of Robert Cummings)

The Court: I think counsel is entitled to lay the foundation for another question, if he has one.

Mr. Cooper: I have, your Honor.

A. Yes, sir.

Q. Now, did you discuss personally and in the physical presence of Oscar Cummins that notice of May 29, 1943, in [221] Los Angeles?

A. This telegram?

Q. Yes. A. Yes.

The Court: I don't understand the theory upon which the question is asked.

Mr. Cooper: I will withdraw the question. I will put it this way.

Q. Were you in Los Angeles on May 29, 1943?

Mr. Roth: That is objected to.

The Court: I think the witness has told us twice that he cannot recall whether he was in Los Angeles.

Mr. Cooper: If your Honor please, that is correct, but I am not necessarily bound to accept that. I have shown the witness a telegram purportedly signed by him on May 29th, and asked if that refreshes his recollection, and then will ask him the question if he now knows whether or not he was in Los Angeles on May 29th.

The Court: Put in that way, he may answer. Does that help to refresh your recollection as to where you were on May 29, 1943?

A. I presume that I had—I was in the office of Oscar Cummins on that day.

Q. By Mr. Cooper: As a matter of fact, Mr. Cummings, you were not in Los Angeles during any period between May 18th and May 29th, 1943. were you? [222]

A. That I can't say. By way of explanation, I am a flyer, and we move around pretty fast sometimes.

(Testimony of Robert Cummings)

Q. That is right.

A. And it is very difficult to ascertain where I was on any day, or at any hour or time, because, when you are flying, your mind is so taken up with that particular phase of the work, and it is very possible that I could have been in Quartzsite, Arizona, and in Oscar Cummins' office on the same day, or in any part of California, for that matter.

Q. Let me ask you this: For how long a period of time were you absent from Los Angeles, we will say, at any time during the month of May, continuously?

A. At the present time I can't recall having been absent from California for more than three or four days at a time.

Q. From Los Angeles.

A. From Los Angeles, California, or this vicinity, for more than three or four days at a time.

Q. Now, it had been your desire for some time, had it not, before April 5, 1943, to be a member of some branch of the armed forces of the United States, the military forces of the United States?

A. I felt that I was doing quite a job in cooperating with the military forces of the United States, in that I was a squadron commander in the CAP, and therefore my duties were [223] working in conjunction with the military forces of the United States.

Mr. Cooper: I will move to strike the answer as not responsive.

(Testimony of Robert Cummings)

Q. By Mr. Cooper: Do you recall having quite a number of conversations with Bob Speers about your desire to join up?

A. Bob Speers and I talked in the office at length about whether or not the CAP was such an organization that, being a member of it, I could make pictures, and I stated to Bob Speers that it was, that I had joined the CAP in good faith for the duration, but that in no way did that hold me to a definite duty with the CAP at any time. In other words, it was, so to speak, like volunteer air raid warden of the sky—I believe I made some remark like that—and it was purely voluntary, and that I could do this duty, because of the fact that I was qualified as a professional flyer and a teacher of navigation and meteorology, and various subjects of that kind, and various aircraft subjects. I stated to him that I was qualified to do this, and therefore I felt that all the spare time I had should be spent in doing it. I talked to him at length about it. We talked many times about it.

Q. In other words, Bob Speers was a friend of yours?

A. A very good friend, yes.

Q. And you went out to eat on occasions together, and [224] things of that sort?

A. We had done a great deal of that a few years before, but after Robert Speers became more entangled in his work at Universal he had been too busy for such things, and I doubt if we had been together much.

Q. As a matter of fact, you didn't have any hesitancy in imparting your feeling to him as to your duty as an American citizen? A. None whatever.

Q. As a matter of fact, you recall, in this conversation on or about April 3rd—can you fix the time when

(Testimony of Robert Cummings)

you had the last conversation with Bob Speers in his office?

A. I can't fix the date; I am sorry. The last conversation I had with him, you mean prior to—

Q. The last conversation you ever had with Bob Speers in his office at Universal.

A. I can't tell you the date; I am sorry.

Q. You recall, however—you have that conversation in mind, do you?

A. Yes; I did have a conversation with him. I think it lasted some three hours.

Q. You went to lunch and you came back and finished up the conversation?

A. That may be possible.

Q. And in that conversation didn't you tell Bob Speers that you were thinking about devoting one hundred per cent of [225] your time to the Civil Air Patrol? I am talking about the last conversation. I am talking about the last conversation you had with him at his office.

A. No. I did say this to Bob Speers: That since I was very disappointed in the way the motion picture "Fired Wife" had been handled prior to its starting date, I felt very much as though, rather than do a picture of that type, I would rather fly for Lockheed Air Terminal or Lockheed Aircraft Corporation or for the CAP, or do something more strategic than to make a motion picture which I felt was not strategic. And on that subject Mr. Speers said, "Well, don't you feel, Bob, that this is a very important thing for the war effort? Don't you feel that in making pictures an actor like you, who can go out and make people laugh, that that is contributing to the war effort, and don't you think that this production is a picture

(Testimony of Robert Cummings)

that will be a comedy and a funny one?" And I said: "I am sorry, Bob, but I do not feel that way." And I said: "I feel that rather than waste my time—because I am a man of two professions—I am a professional flyer and a professional actor, and the services of fliers at this time are greatly in need, and rather than waste my time making a motion picture which I do not feel will do anything for the war effort whatsoever, I feel that I would rather make a better mousetrap by my labor, and I feel that rather than make such a picture I should fly for the CAP." [226]

Q. Didn't you say "for the duration"?

A. No, I didn't.

Q. Don't you recall his telling you at that time: "Bob, if you are going in for the duration, don't you feel that you could at least come and do this picture, that others have joined up before, and we have been able to get them to do a picture?"

A. On this specific occasion I believe I remember Mr. Speers saying: "Do you feel that you should stay in the CAP for the duration?" And I said, "I am in the CAP for the duration, but that has nothing to do with whether I do pictures or not. However, if at any time I wish to resign, I can."

Q. Did you tell him that on April 5th, whatever the date of that conversation was, being the last conversation you had with him?

A. I believe I did, because we spoke very frankly on all these things.

Q. Before this last conversation you had had many conversations, at least several conversations, with Bob Speers about your status in the CAP? A. Yes.

(Testimony of Robert Cummings)

Q. And isn't it a fact that it was before this last conversation that you told him that you could resign at any time you wanted to? Do you remember that question?

A. I don't understand that. [227]

Q. Before this last conversation—and may we just, for the purpose of designating it, call it the conversation of April 5th—you had had at least several conversations with Bob Speers before April 5th, on or about April 5th, about the CAP and you being in it and what you were doing; isn't that correct?

A. Yes; as friends we had talked about it.

Q. And that you enjoyed the work in the CAP?

A. Yes, very much.

Q. And, as friends, you discussed it? A. Yes.

Q. Wasn't it in the earlier conversations that you had with Bob Speers that you told him your status with the CAP, that is to say, that you could resign at any time you wanted to?

A. Well, I may have told him that earlier, but I certainly think we talked about it that very day.

Q. Didn't he on that occasion, April 5th, also try to prevail upon you to at least do this picture?

A. Oh, yes.

Q. And gave you many arguments about why you should?

A. We discussed it as friends, yes.

Q. Don't you recall his telling you about the Hollywood Victory Committee, what they thought about actors as morale builders?

A. Yes; we discussed the Hollywood Victory Committee, [228] as a matter of fact, at that time.

(Testimony of Robert Cummings)

Q. You heard his testimony with respect to that?

A. Yes; he told me at the time that he was a member of that committee.

Q. He told you in substance about the Hollywood Victory Committee about what you heard him testify to yesterday?

A. As a matter of fact, by way of explanation, I can even recall the conversation we had in regard to the Victory Committee.

Q. On this particular occasion? A. Yes.

Q. Do you want to relate it? Do you want to add to that which Bob Speers testified yesterday in connection with that subject matter?

A. It was only this, that possibly, without knowing the stand the studio would take on the matter, I had volunteered to go with the Hollywood Victory Committee show which was to travel through the Carribean, with Billy Gilbert and Desi Arnaz and a few other players that were going down to entertain the boys. Billy approached me on the subject and asked me if I could go. And I mentioned that to Bob Speers, because, when I had volunteered to go—in fact, I signed some papers for the F.B.I. concerning this matter—the Victory Committee had stated to me, it had expressed disapproval of my going, because they said that my studio would not allow me to go. And I mentioned to Bob at that [229] time about this; I said, “Bob, don’t you feel that since you are on the Victory Committee, and I have volunteered to do this, and you think that these pictures are to be in the war effort—why wouldn’t the studio, then, let me go and do that little show around the Carribean for six weeks, do my bit in that way, when I have practically nothing to do.” And

(Testimony of Robert Cummings)

that is the way the conversation came up, to compare the Victory Committee's refusal to allow me to go with the motion picture.

Q. At the conclusion of that conversation on April 5th—April 3rd, I should say—how did you leave the matter? What did you say to him with respect to whether or not you would or would not portray the role in "Fired Wife"?

A. I told Bob that it would be necessary, naturally, for me to talk to Oscar, which was always my habit.

Q. You told him that you would think it over, or words to that effect?

A. I told him I would talk to Oscar, which he knew, that I would talk to Oscar, and we would think it over.

Q. And you called him up following that conversation?

A. Either I called him or he called me; I have forgotten which.

Q. Will you relate that conversation when you called him up? A. When I called Bob Speers?

Q. That is right. Tell us what you said to him. [230]

A. I will see if I can remember all that conversation. I believe I related to Bob that, due to the fact that the motion picture "Fired Wife," which they offered me as my next vehicle, had been cheapened, I felt, from the original intent of the studio, apparently in good faith, but from a much higher class cast and a much higher class director, and that I felt that I would not do the production and would not play the part of "Hank" in "Fired Wife." And it was the first time, as I remember, that Bob and I ever had any words, and I believe he got a little angry at me, and he said that he felt that this was the wrong

(Testimony of Robert Cummings)

thing to do, that I was putting the studio in a terrific hole, and it was not the right thing to do. And I said: "Well, that may be, but I am in a terrific hole also, due to the fact that I was led to believe that we would have a very high class production there, with a very fine cast, which has definitely been cheapened." The director was one which I told Bob that he had commented himself that Charlie Lamont was not the director they originally wanted to use. And he said that he felt that Charlie Lamont was, however, a very capable director and he thought that he had done many, many pictures for Universal that were very funny, and that I should give him a break. And I said, "I have nothing against Charlie Lamont. I only don't like to work for him. And you and Eddie Muhl promised me that there would be no more crap," meaning that there would be no more poor pictures [231] handed to me or attempted to be handed to me. And at that time we became gentlemen, as I understood, in good faith. We met in Oscar Cummins' office and we talked over the entire—

Q. When was this?

A. That was at a prior meeting, and this was during the conversation I have explained.

Q. Maybe I misunderstood you. I thought this conversation, Mr. Cummings, which you were relating, was the telephone conversation? A. Yes.

Q. The last telephone conversation you had with Bob Speers?

A. Yes. I was relating this other conversation which took place in Oscar Cummins' office that was mentioned during this telephone conversation.

(Testimony of Robert Cummings)

Q. I see.

A. And I said: "I feel that I should not do the picture and I should not play the part." And I think Bob said: "Well, you know, of course, that this may mean a suspension." And I said, "If it does mean a suspension it will have to mean it, because I do not feel like playing the part."

Q. Was that the substance of the conversation, as you recall it?

A. As I recall it, that was the substance of the [232] conversation.

The Court: We will take a short recess.

(Short recess.)

Mr. Cooper: If your Honor please, during the recess, as your Honor suggested, the reporter found his notes and began to check them, but he has not gotten far enough to ascertain what the situation was, up to now, so I would like to inquire with reference to the situation with regard to Mr. Kelley.

Mr. Roth: As far as I am concerned, Mr. Kelley certainly need not remain here this afternoon. And I think I will have an answer for Mr. Cooper as to whether or not I will waive any objection I have to the admission of these transcriptions of conversations, shortly after adjournment. I just want to thing the matter over before I give a decisive answer.

Mr. Cooper: Then Mr. Kelley may be excused this afternoon?

Mr. Roth: As far as this afternoon is concerned, yes.

The Court: He may be excused.

Mr. Cooper: You also said that you would give us an answer as to whether or not you wanted all the transcrip-

(Testimony of Robert Cummings)

tions of those telephonic conversations which were taken down.

Mr. Roth: Yes, I will do that at the same time. I will be better able to say that then. [233]

Mr. Cooper: At least, you don't want them here this afternoon?

Mr. Roth: That is right.

Q. By Mr. Cooper: Mr. Cummings, you are familiar, are you not, with the rules and regulations of the Civil Air Patrol with respect to term of enlistment?

A. I was familiar with them. I have been out of that work for some time, actually.

Q. As a result of being an instructor in the Army Air Force, is that correct?

A. Yes. May I change that?

Q. Certainly.

A. I am not an instructor in the Army Air Force. I am an instructor for the Army Air Force.

Q. You were sworn in as such, were you not?

A. As an instructor?

Q. Yes. A. No.

Q. You do know it to be a fact, do you not, that a member of the Civil Air Patrol may be given active service for a month, two months, or for the duration of the war; isn't that true?

A. As it stands now, I do not know whether that is true or not.

Q. You were a member up to what time?

A. I should say up until about a month and a half or [234] two months ago.

Q. In other words, during all the times in controversy you were a member? A. Oh, yes.

(Testimony of Robert Cummings)

Q. And during the time you were a member that was the rule, isn't that true, that a man could join for active service for a period of a month or two months, or a specific period of time, or for the duration?

A. Yes. As a matter of fact, everyone who joins the Civil Air Patrol, I believe, joins the Civil Air Patrol in good faith for the duration, and he may be assigned to active duty. I believe the least that he could be assigned was one month, and, if he wished, he could be signed up for active duty for the duration. However, in actual practice, many of them who decided to go in for the duration in the anti-submarine patrol came back after a few weeks, sometimes after a month, sometimes after two or three months.

Q. Now, following your last conversation with Bob Speers in his office on or about April 3rd—the last one you had in his office—do you have that in mind?

A. Yes.

Mr. Roth: Except for the date.

Mr. Cooper: Except for the date. I understand that he doesn't concede the date.

Q. By Mr. Cooper: Is it not a fact that in the following phone conversation that you had with Bob Speers you told him [235] definitely that you had made up your mind not to do the picture, because you felt that it was your duty to give one hundred per cent of your time to war work, and therefore you were signing up with the Civil Air Patrol for the duration?

(Testimony of Robert Cummings)

A. That is not exactly what I said, I am quite sure.

Q. Did you say that in effect?

A. I said to Bob Speers what I had repeated to him on occasions when we had met in regard to the picture "Fired Wife," when I found out that the production was not what it had been represented to me to be, and I said to Bob Speers that rather than waste my time on what I deemed a B production, which Bob said was an A production many times—I said: "I do not feel that it is an A production; I think it will be a B production when it comes out, and rather than waste my time on such a production," which he knew, "I would rather fly for Lockheed bombers, testing, or fly for the Civil Air Patrol."

Q. You told him definitely that you would not do the picture, didn't you? A. I did; yes.

Q. You didn't tell him that you were going to devote a hundred per cent of your time to the war effort, in substance? A. That I didn't say.

Q. Mr. Cummings, I show you Defendant's Exhibit A for identification, and ask you if that is your signature?
[236] A. That is my signature.

Mr. Cooper: I now offer Defendant's Exhibit A, heretofore marked for identification, in evidence.

Mr. Roth: We make no objection.

Mr. Cooper: That is all.

The Court: It may be marked in evidence.

[DEFENDANT'S EXHIBIT NO. "A"]

Universal City, California

November 27, 1941

Universal Pictures Company, Inc.

Universal City, California

Gentlemen:

Referring to paragraph 15 of my contract of employment with you dated November 21, 1938 please be advised that all written notices which you are required or may desire to serve upon me under or in connection with said contract may be addressed to me at

c/o Oscar Cummins,
8511 Sunset Boulevard,
Los Angeles, California.

Very truly yours,

Robert Cummings.
(Robert Cummings)

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Deft's Exhibit No. "A". Date: Jan. 4, 1944, for Identification. Date: Jan. 5, 1944, in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [243]

(Testimony of Robert Cummings)

Cross-Examination

Q. By Mr. Roth: Mr. Cummings, did you ever sign up for active duty in the Civil Air Patrol?

A. No, I didn't.

Q. In conversations which you have had with Mr. Bob Speers in respect of your war service, did you ever have a conversation with him about your volunteering to serve as a pilot in the United States Army?

A. I am sorry. I couldn't get all of that.

(Question read by the reporter.)

A. I believe in the conversation that we had in his office the last day, which I believe was the one that lasted so long, it seemed to me several hours, I talked to Bob on the subject of how badly I felt that, because of my age, I was not allowed to enlist in any of the flying activities of the Army or the Navy. And Bob told me at the time, he said that I shouldn't feel bad about that, "because I think you are doing a swell job in what you are doing." He said, "However, it is the studio's policy to not try to influence an actor one way or the other. But why do you feel that you [237] should go into any one of these services?" And I said: "It isn't a question of going into them, but I feel very, very bad about it, that I cannot be accepted either as a cadet or in flying crews."

Q. How long had you been a member, a volunteer member, of the Civil Air Patrol?

A. To that date, from the time that my application was accepted and I received my identification card from the CAP. I can't say the exact date, as the identification card does not carry the exact date, but it was some, I should say, month and a half or two months, something like that,

(Testimony of Robert Cummings)

after Pearl Harbor that I joined. I wouldn't say "joined"—I sent in the application with the belief that it would be accepted.

Q. Was it approximately from January or February, 1942, up to the time you had this conversation with Bob Speers in his office, that you were a volunteer in the Civil Air Patrol? A. Yes.

Q. And during all that time you had been making pictures for Universal?

A. Yes; not all of the time.

Q. During part of that time, when they requested it, you had made pictures for them? Let me put it that way.

A. Yes.

Q. Did your voluntary duties with the Civil Air Patrol [238] interfere in any way with your right to make pictures?

Mr. Cooper: Pardon me just a minute, counsel. I am going to object to that, on the ground that it is immaterial, because I am afraid we are liable to get into some collateral matters on that question. I will withdraw the objection, but suggest that we are going to get into some collateral matters there.

Mr. Roth: Rather than take a chance on getting into collateral matters, I would rather put the question this way.

The Court: Let the answer go out.

Q. By Mr. Roth: Did you make pictures during the period of time that you were a volunteer member of the Civil Air Patrol? A. Yes, sir.

Q. You testified, in answer to questions by Mr. Cooper, that you had a conversation with Mr. Speers in

(Testimony of Robert Cummings)

his office some time prior to April 10th, but you were unable to fix the exact date; is that correct?

A. That is correct.

Q. Can you fix it in relation to the number of days prior to April 10th—two days prior to April 10th, or what?

A. I think it was probably within four or five days before April 10th. I can't remember the exact date. I think it was sometime in there. [239]

Q. How did you happen to go to the office of Bob Speers?

A. I don't remember exactly how I happened to go, whether Bob called and said that he wanted to talk to me—I think that was probably it, as I think back over the conversation that followed. I think Bob called me and told me that he wanted to talk to me about a production. And I dropped into his office quite often, because we were good friends, and I don't remember how this happened.

Q. At the time you went to his office and had this conversation, which you say took three or four hours?

A. I think that is correct.

Q. As nearly as you can, give the court the entire conversation from the time you came into Mr. Speers' office until the time you left, as well as you can remember it.

A. All three hours?

Q. As much as you can remember of the substance of the conversation.

A. As I said before, we were very good friends, and naturally there were many subjects discussed, on the war, when we thought we would win the war, and about navigation and things I was teaching, and various things that Bobbie Speers was interested in, in regard to my flying.

(Testimony of Robert Cummings)

because we had had numerous occasions to be interested in flying. And he was at one time my publicity man at Paramount, and we went back into the days when we were at Paramount, and [240] how, at one time, we had gone to Lindsay, California, to crown the Orange Queen up there. And after while we got down to the subject matter of why I was there. And Bobbie, I am sure, felt that he didn't want to hurt me by telling me what he was forced to tell me, as a man who works for Universal Pictures. And finally we got around to the subject matter of the production, which he had told me about sometime earlier, "Fired Wife," in which I was to play this part of "Hank." And he said: "Now, Bobbie, as I told you before, we are doing everything possible to make this one of the greatest productions we have made this year. It is going to be a big picture." And he said: "You said you liked the script." And I said: "Well, I didn't say exactly that I liked the script. I only said that if the script was to be produced under the circumstances that you mentioned before, I think it had a chance, and I was willing to use my time to make the production." And he said: "Now, you know we are going to now have to use Charlie Lamont for a director." And I think I stated about that, something about I didn't see what they had to use him for, because he is not a director, back and forth, and I said: "Please forgive me. I have nothing against Charlie Lamont personally, but I only feel that Charlie Lamont is not a man who is capable of directing a good picture, or at least in my opinion I thought so." And Bobbie said: "Now, Bobbie, I want you to think this over [241] carefully, because this is something that is important to me and it is important to you. It is the

(Testimony of Robert Cummings)

first time we have gotten down so that we could work on amicable terms about a production since before you and Dan Kelley didn't get along very well." And he said: "I have volunteered to always be the intermediary between you and Dan Kelley." And he said: "Now, this is the first time we have gotten together, and I want to make a go of it, and I know you want to make a go of it." And I said: "Yes, I want to make a go of it, but I am not going to sacrifice everything I have built up for years to make a production which I don't feel is of any value to me or to the public." And he said: "But it will be a good picture, Bobbie. I tell you the studio has good faith in this, and they believe it is going to be a good picture, and I believe they are sincere in it." And he said: "I know at times we have had difficulties and troubles, you and Dan have, and if you will listen to me we can get together and make a good production here." And I said: "Bobbie, I am willing to listen to you, but when you tell me that Charlie Lamont is the director, and now I learn for the first time that Charles Coburn, who was employed at the studio, is not going to be in the picture, and that the type of actress of Tere-a Wright to play the leading lady, that the studio was going to attempt to put in the production, is now not going to be in it, and that, instead of Eddie Rochester Anderson playing the valet, [242] Mankan Moreland is going to play it, from now on, and, besides these last disturbing facts, I hear that Charlie Lamont is directing the picture. I don't feel that the production is going to be a big production, and I don't think the studio is acting in good faith. I think the only reason that I was told this information about all this fine cast

(Testimony of Robert Cummings)

and this director that was mentioned"—it was mentioned at the time that there would be a director comparable to the talent of Leo McCarey or Frank Borzage,—“and now, since these people that I consider very fine in the industry are not going to be in the picture, I think the budget has definitely been cheapened, and I think the shooting schedule will be definitely cut down, and I think the publicity budget of the picture will be cut down, and the fact that you offer Diana Barrymore is still no inducement for me to want to do the picture.” And Bobbie said: “I understand the way you feel,” and he said, “I know that many people in the industry do not consider Charlie Lamont a great director, but he is coming up, and I think in a few years he will be a really fine director.” And I said: “Well, in a few years, when he gets to be the director that you say he is going to be, I will be very happy to work with him.”

Q. Was anything said by Mr. Speers about the picture being one that you ought to do for the war effort?

A. No, not directly. However, Bobbie did say: “I [243] think you couldn’t do a greater job for your country than making a picture that is a funny picture and makes the boys in the camps laugh.” And I, to this, replied that I felt that if it were a picture that was definitely something that the government was inspired about and wanted it to be put on, and if it were something that was definitely a need for the war effort, and was not just a picture to make money for Universal and another so-called box office proposition, that I would be happy to do one for the government for nothing, that I didn’t care who played in the production or what it cost, if the government wanted me

(Testimony of Robert Cummings)

to do it, but that this was not the case, that it was a commercial proposition between Universal and the exhibitors and it had nothing to do with the war effort.

Q. Was anything said by Mr. Speers in that conversation, in any part of that conversation, about the possibility of your suspension?

A. At that time Bobbie and I were very friendly, and I know that he didn't want to rile me or upset me, because he just wouldn't do that. However, after that, I think he did mention, however, during the course of the conversation, that it would be a painful thing for him to see this first sort of reunion between himself and myself, which meant nothing to him actually in a monetary way, excepting his own pride, that he felt that he would hate to see it fail, and that such an act on my part of refusing to do the picture [244] might lead to a suspension.

Q. Did you make any comment on that?

A. I think I said that if it were necessary for me to be suspended because of such a production, that I would just go on and fly for Lockheed or for the Civil Air Patrol during the suspension, because I didn't feel that it was worth my time to waste it making a picture which was definitely crap.

Q. Was anything said by you or by Mr. Speers about talking it over with Oscar Cummins before you definitely refused to do the picture?

A. I mentioned, naturally, that I always talked everything over with Oscar before I did anything.

Q. When you met after that conversation with Mr. Speers, you had a conversation with Oscar Cummins in which you told him about your conversation with Bob Speers?

A. Sure.

(Testimony of Robert Cummings)

Q. How long after?

A. I can't say how long after. I imagine it was a few hours. I think I got him on the phone as soon as I got home that evening, and I believe that is when we talked. I couldn't swear to that.

Q. Without telling us about the conversation with Oscar, do you know whether Oscar Cummins, after his conversation with you, went to Universal to talk to Mr. Speers or somebody there? [245]

A. After his conversation with me?

Q. With you. Maybe I don't make myself clear. After you reported to Oscar Cummins the conversation you had had with Robert Speers, do you know whether Oscar Cummins went to Universal to talk to anyone at Universal?

A. That I am not sure about. I know he did go to talk with him about it and about the director.

Mr. Cooper: I move to strike the answer "he did go," as hearsay, and a conclusion of the witness.

The Court: It sounds like a good objection.

Mr. Roth: Yes, your Honor. As far as the conversation is concerned, it is a good objection, but it does show, of course, his contact, and it seems that it doesn't lie very well with counsel to make an objection on the ground of hearsay, because most of the evidence put in by the defense, except the conversation between Mr. Speers and Mr. Cummings, is hearsay.

Mr. Cooper: If your Honor please, I have great respect for counsel, but I do resent the suggestion that I have been offering evidence here which is not admissible under the rules of evidence.

(Testimony of Robert Cummings)

The Court: Let me see if we can't get at it in another way. Are you seeking to learn from the witness whether or not he was subsequently advised that Oscar Cummins had contacted Mr. Speers?

Mr. Roth: Mr. Speers or someone at Universal. [246]

The Court: I will allow that question.

Q. By Mr. Roth: Do you know whether or not Mr. Oscar Cummins went to Universal and saw someone at Universal with respect to this picture?

The Court: No. The question in that form is open to the criticism that has been interposed. I think it is proper to inquire of the witness whether or not he was advised and informed to the effect that his representative had gone to Universal to contact someone there, one of the officials.

Mr. Cooper: May I inquire of counsel, through the court, as to the materiality of that? It occurs to me that that would be immaterial. It may be material. I just don't understand counsel's purpose.

Mr. Roth: All we expect to show by it is that Robert Cummings did talk to Oscar Cummins after he left Mr. Speers; that Oscar Cummins went to Universal and spoke to someone out there about the picture, and thereafter came back and told Robert Cummings about the conference, and then Robert Cummings got on the telephone and told Mr. Speers he wouldn't do this picture and had the conversation which was inquired about.

Mr. Cooper: Very well. I understand the purpose.

Q. By Mr. Roth: Did Oscar Cummins, subsequent to this conversation, advise you that he had seen someone at Universal in respect to this picture? [247]

(Testimony of Robert Cummings)

A. Not exactly that he had seen them, but I know he talked to somebody else, but I can't say whether he went there in person or not.

Mr. Cooper: If your Honor please, I move to strike the answer of the witness as a conclusion, and obviously hearsay.

The Court: Cummings' statement that he knows Oscar Cummins spoke to someone?

Mr. Cooper: That is correct.

The Court: Yes; I think in the present state of the record—Mr. Cummings, between the time you held this lengthy conversation in person with Mr. Speers and the time that you telephoned Mr. Speers to the effect that you would not portray the role of "Hank" in the picture "Fired Wife," did you speak with Mr. Oscar Cummins?

A. Yes, sir.

The Court: And did you learn from him that he had spoken to either Mr. Speers or some agent or representative of the Universal Pictures Company?

A. Yes, sir.

Q. By Mr. Roth: And it was after that that you had your telephone conversation with Mr. Robert Speers to which you have already testified; is that correct?

A. Yes, sir.

Mr. Roth: That is all.

Mr. Cooper: One further question. [248]

(Testimony of Robert Cummings)

Redirect Examination

Q. By Mr. Cooper: Did you ever make a request to the studio for release from your contract, to enter military service?

A. Did I personally?

Q. Yes. They never turned you down on that, did they?

Mr. Roth: Just a moment. Let us have one question at a time.

Mr. Cooper: All right.

Mr. Roth: Would you read the question, Mr. Reporter?

(Question read by the reporter.)

The Court: Let us get back to the prior question.

Mr. Cooper: That is all right. A. No.

Mr. Cooper: That is all.

Mr. Roth: That is all.

The Court: You may step down. May I inquire whether you have some additional witnesses?

Mr. Cooper: No, if your Honor please. With the exception of that one matter that is still pending with respect to Mr. Kelley, the defendant is about to rest.

The Court: As I understand it, counsel contemplate waiting after adjournment this afternoon and conferring with the reporter, and endeavoring to reach some conclusion respecting the matters which remain in abeyance?

Mr. Cooper: That is correct, your Honor. [249]

Mr. Roth: Yes, your Honor. I think we will be able to arrive at some conclusion within a few minutes.

The Court: Is it contemplated that there will be some further testimony by way of rebuttal?

(Testimony of Robert Cummings)

Mr. Roth: Yes, your Honor. I may, by way of rebuttal, put Oscar Cummins on the witness stand to testify to a number of conversations he had with Mr. Muhl and with Mr. Speers at Universal or over the telephone between the dates of April 10th and May 29th. And I may put Robert Cummings on in rebuttal for some direct questions, but it may be also that before tomorrow morning I may decide to rest on the evidence of the defendant, as far as estoppel is concerned.

The Court: Well, then, we will take the adjournment until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until 10 o'clock a. m., Thursday, January 6, 1944.) [250]

— — —

Los Angeles, California, Thursday, January 6, 1944;
10 a. m.

(Parties present as before.)

Mr. Roth: If the court please, after the adjournment last night, Mr. Cooper and I went over the notes of the shorthand reporter, and plaintiff has agreed to stipulate that the transcription of the conversation Mr. Kelley had with Mr. Thau on May 28th might be received in evidence. Counsel for the plaintiff has also waived the demand we made upon Mr. Kelley to bring in the records of transcriptions made by Mr. Kelley or his secretary during the month of May, 1943.

Mr. Cooper: If your Honor please, we accept the stipulation, counsel. I might say that my recollection was correct, that counsel had inquired about the conversation, and, with the court's permission, I should like to read the conversation into the record.

The Court: Yes. Now, you are about to read into the record the transcript made in the defendant's studio of certain conversations had between the witness Kelley and whom?

Mr. Cooper: Benny Thau, of M-G-M, on May 28th.

The Court: It is just one conversation?

Mr. Cooper: Just one conversation, your Honor.

The Court: Very well.

Mr. Cooper: "Thau: Did they talk to you about Bob [251] Cummings—

"Kelley: Yes, the guy is on suspension—he just refused to do a picture over here, and it is one of those things again—he said he would rather do pictures on the outside.

"Thau: Well, we have a great part here.

"Kelley: Well, he is on suspension here—we wouldn't let him go on the outside—if we did that he would never do a picture here. He claims he can't do a picture on account of being in the army.

"Thau: Well, we could use him here—

"Kelley: We can't do that—he is under suspension.

"Thau: Well, when we have such cases here we lift the suspension until the part is finished and then the suspension is resumed when he finishes the role.

"Kelley: Yes, Ben, but then we couldn't get anything here.

"Thau: Well, I don't even know if he likes the picture—if you have nothing for him—

"Kelley: We have and he wouldn't work—

"Thau: I thought that picture was finished.

"Kelley: It is but we got a picture now we could put him into. You know what we are up against. We have to use the Bog Paiges and Alan Curtis'—we are in a Hell of a fix.

"Thau: Well, what is it if he don't work for you. Maybe we could work out your problem for you.

"Kelley: No—everything was fine. He did the Boyer [252] picture and was all set to do the other—everything was fine and he was tickled to death and two days before the picture was to start he called and said he couldn't work—that he was going into the Civil Air Patrol—so that's the situation.

"Thau: Okay."

Do you desire, counsel, that we offer the transcription in evidence?

The Court: At least it will be available for reference purposes.

Mr. Cooper: I will offer it, then, as defendant's exhibit next in order, for the purposes of reference.

I should like to ask the plaintiff one more question.

The Court: Just a moment. Let us mark that as an exhibit of the defendant. It will be Defendant's Exhibit D.

[DEFENDANT'S EXHIBIT NO. "D"]

TELEPHONE CONVERSATION

May 28th (With Benny Thau)

T—Did they talk to you about Bob Cummings—

K—Yes, the guy is on suspension—he just refused to do a picture over here and it is one of those things again—he said he would rather do pictures on the outside

T—Well, we have a great part here

K—Well, he is on suspension here—we wouldn't let him go on the outside—if we did that he would never do a picture here. He claims he can't do a picture on account of being in the army

T—Well, we could use him here—

K—We Can't do that—he is under suspension

T—Well, when we have such cases here we lift the suspension until the part is finished and then the suspension is resumed when he finishes the role

K—Yes, Ben, but then we couldn't get anything here

T—Well, I don't even know if he likes the picture—if you have nothing for him—

K—We have and he wouldn't work

T—I thought that picture was finished—

K—It is but we got a picture now we could put him into. You know what we are up against. We have to use the Bob Paiges and Alan Curtis' We are in a Hell of a fix.

T—Well, what good is it if he don't work for you. Maybe we could work out your problem for you

(Defendant's Exhibit D)

K—No—everything was fine. He did the Boyer picture and was all set to do the other—everything was fine and he was tickled to death and two days before the picture was to start he called and said he couldn't work—that he was going into the Civil Air Patrol—so that's the situation

T—Okay

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Defendant's Exhibit No. "D" in Evidence. Date: Jan. 6, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [247]

Mr. Cooper: I just have one question. [253]

ROBERT CUMMINGS,

a witness heretofore duly sworn on behalf of plaintiff, upon being recalled for further examination, testified as follows:

Further Cross-Examination

Q. By Mr. Cooper: Did you at any time, before or after April 10, 1943, receive permission in writing from the studio to leave Los Angeles?

A. Permission from the studio?

Q. Yes.

Mr. Roth: In writing?

Mr. Cooper: That is right.

A. I can't say that I did.

Mr. Cooper: That is all.

Mr. Roth: No questions.

Mr. Cooper: The defendant rests, your Honor. [254]

REBUTTAL.

Mr. Roth: I will call Mrs. Cummins.

ADELINE CUMMINS,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Adeline Cummins.

Direct Examination

Q. By Mr. Cooper: Mrs. Cummins, you are the wife of Oscar Cummins? A. Yes, sir.

Q. And where did you reside on or about April 10, 1943? A. 810 Warner Avenue.

Q. At that time did you have a maid in your employ? A. Yes.

Q. On or about April 10, 1943, were you called by Western Union, and was a message read to you over the telephone? A. No.

Q. I will show you a telegram, which has been introduced in evidence here as Defendant's Exhibit B, and ask you to read it. A. Aloud?

Q. No—to yourself. Was any message like that read [255] to you on April 10, 1943?

A. No, it was not.

Q. Was any message like that read to you on April 11, 1943? A. No.

Q. Was any message like that read to you on April 12, 1943? A. No.

Q. Do you know whether or not you were in town on April 10, 1943?

A. Since the date has arisen, I am in doubt whether I was in town. I think I was in Palm Springs at that time.

(Testimony of Adeline Cummins)

Q. When you are out of town is the maid at your home? A. Sometimes.

Q. Whether you were in town or out of town, did your maid ever tell you that a message like that had been delivered at the house?

A. No, she never told me.

Mr. Cooper: That is all.

Mr. Roth: No questions. I will call Oscar Cummins. [256]

OSCAR CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff, upon being recalled as a witness in rebuttal, testified as follows:

Direct Examination

Q. By Mr. Roth: I think you have been sworn, haven't you? A. Yes, sir.

Q. Mr. Cummins, did you ever make a statement to anyone connected with PRC between the dates of April 10th and June 3rd, 1943, that Robert Cummings was not available for a picture, because he was in the air shuttle service, and if anyone wanted to make a picture with Robert Cummings they would have to call the—

A. No.

Mr. Cooper: To which we object on the ground that it is immaterial.

The Court: Let the answer go out.

Mr. Cooper: It is not material. It isn't material what he told the PRC. It is what he said to the witness Muhl. It is immaterial what he said to PRC. Mr. Muhl testified as follows: Muhl testified that he had a con-

(Testimony of Oscar Cummins)

versation with this witness on May 28th, in which this witness said to him, Muhl, as follows: That PRC, a producing organization that he, Cummins, had not heard of before, had called him and asked him about Cummings' availability, and that he, Cummins, advised them that Cummings was engaged [257] in work in connection with the air shuttle service, and if anyone wanted him they would have to see General Arnold of the Army Air Corps to get him.

Mr. Roth: If your Honor please, even from the statement which was read, which was a crystallization of a conversation Muhl had with Oscar Cummins, it appears that the statement was made to PRC, but if there is any ambiguity it is settled by Muhl's own affidavit, which is on file, in which he says the following, on page 2 of his affidavit:

"Prior to the receipt of the notice sent by Robert Cummings referred to above, I had a telephone conversation with Oscar Cummins, the attorney and personal representative of the plaintiff, on March 28, 1943."—it is, in the affidavit, which he corrected—"at or about 10:00 a. m. of said day. I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him."

(Testimony of Oscar Cummins)

First I want to find out whether he said that to anyone at PRC, and then whether he repeated that to Mr. Muhl. [258]

Mr. Cooper: My position is that whether he did or did not mention that to PRC or anyone else is immaterial. The only materiality here is whether or not he did make the statement to Muhl.

The Court: First of all, does the defense contend that this witness made any such statement to PRC? If you make no such contention, I will sustain the objection.

Mr. Cooper: We don't know, if your Honor please.

The Court: Will you make any argument to that effect?

Mr. Cooper: No, your Honor.

Mr. Roth: I will withdraw the question.

Mr. Cooper: We cannot do so, on the state of the record.

The Court: That clears up the ambiguity.

Q. By Mr. Roth: Did you ever say to Mr. Muhl, substantially or in effect, on May 28, 1943, or at any other time, any of the following: "Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him"?

Did you ever make that statement to Mr. Muhl, substantially or in effect? A. No.

Q. Did you ever make that statement to anyone, [259] substantially or in effect?

(Testimony of Oscar Cummins)

Mr. Cooper: That is objected to as immaterial, whether he made it to anybody else or not.

The Court: I am inclined to think so.

Mr. Roth: Suppose he made it to Kelley.

Mr. Cooper: If he made it to Kelley, you should have put Mr. Kelley on the stand to testify to it.

Q. By Mr. Roth: All right. Did you have a conversation with Mr. Muhl and Mr. Speers shortly before April 12, 1943? A. Yes.

Q. You did have? A. Yes.

Q. Where did the conversation take place?

A. In Mr. Muhl's office.

Q. Mr. Speers was present?

A. Mr. Speers was present.

Q. Anyone else there?

A. No; just the three of us.

Q. State what was said.

A. Bob Cummings had called me on the phone and told me the way they had changed the picture, and asked me if I wouldn't go over and try to intercede and get the original cast, and have a director of comparable standing, which merits his direction. And I called Bob Speers on the phone and made the appointment with Bob Speers and Eddie Muhl, and went over and saw them in Eddie Muhl's office, and told [260] them the fact that Bob couldn't, under any circumstances, make a picture with a man like Charlie Lamont, and they both at that time told me that Charlie Lamont was not a good director, that they knew it, that the studio was trying to build him up, and I asked Eddie Muhl directly, "If you will please get me a good director I will intercede with Bob and have

(Testimony of Oscar Cummins)

him make the picture," and Eddie Muhl said, "It is Charlie Lamont, and that is it," and I left it there.

Q. Was there anything said in that conversation by you or by either you or Mr. Muhl or Mr. Speers about the Civilian Air Patrol, or the fact that Robert Cummings was going into the armed service?

A. No, there was no such thing.

Q. You are familiar with Defendant's Exhibit A, the telegram of April 10th, which was introduced in evidence here? It is April that I am referring to. Did you receive a copy of that telegram on April 10th?

A. No.

Q. Were the contents of that telegram transmitted to you in any way on April 10th? A. No.

Q. Did you receive it on April 11th? A. No.

Q. Were the contents of the wire transmitted to you in any way on April 11th? A. No. [261]

Q. Did you receive it on April 12th? A. No.

Q. Were the contents of that telegram transmitted to you in any way on April 12th? A. No.

Q. When was the first time you heard about it?

A. The first time I heard about that telegram was when you called me recently and asked me if I had ever heard of it.

Q. Did I ask you to search your files for a copy of it?

A. Yes.

Q. Did you find any? A. No.

Q. Did you, in any conversation you had with Mr. Muhl, or that you may have had with Mr. Speers, or that you may have had with Mr. Ward or Mr. Speers, between April 5th and June 3, 1943, ever say, in substance or effect, anything to the effect that Robert Cummings

(Testimony of Oscar Cummins)

was unavailable because he had joined the Civil Air Patrol for the duration of the war? A. No.

Q. Or that he had joined the air forces of the United States for the duration of the war? A. No.

Q. You heard read into evidence yesterday a stipulation as to telephone conversations between yourself and Mr. Muhl [262] between the dates of April 10th and June 3, 1943? A. Yes, I did.

Q. In any of those telephone conversations was anything said by you or Mr. Muhl to the effect that Robert Cummings was unavailable by reason of the fact that he had joined the air forces of the United States or that he had joined the Civil Air Patrol for the duration of the war? A. Absolutely not.

Mr. Roth: Cross examine.

Cross-Examination

Q. By Mr. Cooper: You did know, did you not, that Bob Cummings had been instructed to report at 10 o'clock on April 12th at the offices of Mr. Dan Kelley, didn't you?

A. I think either Bob Speers or Eddie Muhl told me that.

Q. When did they tell you that?

A. I think that was in the conversation Muhl related yesterday, on April 13th. I am not certain of the date.

Q. No. I mean before the 13th, didn't you know that Robert Cummings had been instructed to report at Dan Kelley's office? A. No.

Q. On April 12th, at the hour of 10 o'clock a. m.?

A. No.

(Testimony of Oscar Cummins)

Q. Do you know where Bob Cummings was on the 10th of April, 1943? A. I don't know. [263]

Q. As a matter of fact, you know that he was out of the city, don't you?

A. On the contrary, I think he was in town.

Q. What makes you think that? Do you have some recollection of his being in town on April 10th?

A. The only recollection I have is that during the controversy in reference to the picture called "Fired Wife," I was in touch with Bob constantly, and I feel certain that he was around town.

Q. That is just a feeling you have?

A. It is my best recollection.

Q. As a matter of fact, the controversy and the conversations about whether he would or would not perform the role of "Hank" in "Fired Wife" occurred about the 3rd or the 5th of April; isn't that correct?

A. I can't state the time, because I don't have any memoranda, but I am confident that Bob Speers and myself discussed that up until the last moment.

Q. Did you have this conversation with Ed Muhl on the 13th of April?

Mr. Roth: Pardon me. You promised me copies of those.

Mr. Cooper: I don't recall that I promised you. If I did it slipped my mind.

Mr. Roth: I would just like to follow you.

Mr. Cooper: Certainly. That is perfectly all right.

Q. By Mr. Cooper: At 12:40 p. m. on April 13, 1943, [264] although the time is immaterial, did you tell him— Well, let me read the whole thing and ask you if this happened, in substance or effect: Ed Muhl admitted

(Testimony of Oscar Cummins)

you and told you that, following up Robert Cummings' talk to Bob Speers over the telephone, that he was in the CAP for the duration, and that, in effect, he would not report for his role in the photoplay "Fired Wife," that we, meaning Universal, had wired Cummings to report yesterday morning to Dan Kelley, and that, of course, he failed to do so, and that we, to establish a clear position, intended to suspend him from the payroll as of that date, and you said that that was entirely proper. You further stated that you were sick at the situation which had arisen, and that you would talk to Bob about it, and you were trying to get him to come in and have a further discussion with Bob Speers and himself. And at this point Ed Muhl told you that they were, of course, going forward with their plans to recast the role, and you said that you understood that they would have to do this, but you didn't think this situation was fair to Bob or to the studio or to Bob's country, and you would like to straighten it out. Did you have that conversation, in substance or effect?

A. There was a conversation, but there is so much in there that never occurred that it is astonishing.

Mr. Cooper: I will give him this.

The Court: May I suggest, in view of the witness' [265] answer, that you let him pick out those portions of the alleged conversation which the witness, on the one hand, concedes took place, either in substance or effect, and the portions which he is prepared to state were not part of any such conversation.

The Witness: I am presuming that this conversation took place on the 13th of April, at which time Eddie Muhl called me on the phone. In the first place, there was never

(Testimony of Oscar Cummins)

any discussion about the CAP, and never any discussion about Bob going in for the duration. He told me that they were going to suspend Bob. I offered no statement; I wasn't advising them. We didn't discuss the suspension any further than that. He told me they were going to suspend Bob. Here, if your Honor please, this is underscored.

Mr. Cooper: That is my underscoring.

A. (Continuing) There was no statement to the effect at that time that I was still trying to get Bob to come in, because they knew, after I left the studio—

Mr. Roth: Don't guess at what they knew.

The Court: Let that part go out.

A. (Continuing) I told him that the situation was very unfair to Bob, because of the promises that were made and the promises that were broken.

Q. By Mr. Cooper: Was anything mentioned to you on April 13th about a wire having been sent?

A. No, sir. [266]

Q. At any time on April 10th, or up to and including, we will say, April 15th, was any mention ever made in any conversation about a wire that had been sent to Bob Cummings?

A. No, sir.

Mr. Cooper: If your Honor please, it is my recollection that the witness testified, when I first started to cross-examine him, that the only thing mentioned about a wire was in a conversation with Ed Muhl. Could I have the reporter read that back to me?

The Court: I think you will find that there is no reference to a wire, but I will let the reporter go back and read that portion of the testimony.

(Testimony of Oscar Cummins)

Mr. Cooper: I won't waste the time of the court. The record will speak for itself.

Q. Now, did you talk to Ed Muhl on or about May 28th on any subject? A. No.

Q. What makes you so positive about it?

A. Because I know I didn't talk to him on May 28th.

Q. Did you talk to him at all on the telephone at any time between April 13th and May 28th? A. Yes.

Q. Approximately how many times?

A. I don't know how many times, but I know he called me in the middle of May and asked me if I knew that Robert Cummings— [267]

Q. I am not asking you for the conversation. I am asking you when you had the conversation.

A. I think that was in the middle of May.

Q. About the middle of May, about May 15th?

A. I don't know.

Q. I do not want to hold you down to that date, Mr. Cummins, but you said about the middle of May, and so I say, on or about May 15th. Is that fair enough? The middle of May. All right. Sometime the middle of May did you have a conversation with him, to the best of your recollection, on the telephone, between the middle of May and the last part of May? A. Yes.

Q. All right. Will you fix, then, the approximate date, to the best of your present recollection, when the next conversation took place between the middle of May and the last of May?

A. It was the latter part of May, around the 25th or 26th.

Q. Do you have some way of fixing the date of May 25th or May 26th in your mind? A. Yes.

(Testimony of Oscar Cummins)

Q. How do you fix that date?

A. I had luncheon with Mr. Muhl and one of the other executives of the studio, an Army captain, at Universal Studio. [268]

Q. I take it that you know, or at least you have testified that on or about the 26th of May you made a request for the check of Bob Cummings?

A. That is correct.

Q. With reference to the date of that request, when did you have luncheon with this Army captain and Ed Muhl?

A. On the same day.

Q. Did you make any reference on that day to the check, that you were requesting a check for Robert Cummings?

A. No. I left the luncheon and went back to Mr. Muhl's office, and left his office on or about 2:30, and went over to the paymaster and asked for it, and it wasn't there, and I went into Mr. Steinberg's office and asked him if Bob's check was ready, and he looked in his files, and he came back and said, "No; Bob is still under suspension."

Q. You knew, then, on the occasion when you were having lunch with Ed Muhl that you were going to make a request for the check, didn't you?

A. I knew I was going to ask for Bob's pay, which he was legally entitled to.

Q. You knew he was under suspension, didn't you, at least from the notices that had been sent by the studio?

A. I knew he was under suspension for five weeks and two days, from the notice.

(Testimony of Oscar Cummins)

Q. You received the notice of May 18th, did you not, putting him on suspension? [269]

A. I don't remember the date I received the notice.

Q. I will read you the one of May 18th.

Mr. Roth: We will stipulate that it was sent.

Mr. Cooper: I want to read it to him.

Mr. Roth: I will stipulate to the date. I am not suggesting that you do not read it to him.

Mr. Cooper: Thank you very much, counsel.

Q. By Mr. Cooper: Did you not receive this notice before May 26th, the notice dated May 18th, as follows:

"Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Blvd.,
Beverly Hills, California.

Dear Mr. Cummings:

"Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five weeks and two days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect. Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, [270] refusal and/or neglect to perform your obligations thereunder."

You received that? A. Yes.

Q. You read it? A. Yes.

(Testimony of Oscar Cummins)

Q. You knew then that Universal was of the belief, at least, that Robert Cummings was under suspension, didn't you?

Mr. Roth: That is objected to as calling for a point of law, and as to what Universal knew.

The Court: I think the question in its present form is open to that criticism, and the objection is sustained.

Mr. Cooper: Very well.

Q. By Mr. Cooper: What did that notice mean to you? A. Nothing.

Q. You are a lawyer? A. Yes.

Q. You have been admitted to practice for how long?

A. 24 years.

Q. Did you expect to get the check when you went there? A. Absolutely.

Q. You went there for that purpose? A. Yes.

Q. For no other reason?

A. For no other reason. [271]

Q. Didn't you go there for the purpose of merely establishing the fact that there was no check there?

A. Absolutely not.

Q. Why didn't you go back to Ed Muhl and ask him about it?

A. There was no need for me to go back and discuss a check that was supposed to be there.

Q. You had done that before and you got the matter straightened out, hadn't you?

A. Never on a question of a check that was due to Bob for salary.

Q. You had some other people call out there, did you not? A. Certainly.

(Testimony of Oscar Cummins)

Q. And you had one of those conversations recorded, didn't you?

A. What do you mean "recorded"?

Q. You had somebody listen on an extension line and take it down?

Mr. Roth: That is assuming a fact not in evidence. He listened in and somebody else called.

Q. By Mr. Cooper: You listened in when somebody else called, didn't you? A. Yes, sir.

Q. Was that for the purpose of getting the check, or for the purpose of proving that the check wasn't ready? [272]

Mr. Roth: I object to what the motive was, as immaterial.

Q. By Mr. Cooper: Why did you do that?

Mr. Roth: The same objection.

Mr. Cooper: I think his motive is very important in this case, it being an equitable matter.

The Court: It is not clear to me. I will let the witness answer.

A. I couldn't believe that, after all these professions and statements of great love and affection and concern about Bob's welfare, that the studio would deliberately go and withhold his pay that was due him.

Q. By Mr. Cooper: You knew, did you not, that Universal wanted the use of his services?

Mr. Roth: Just a moment. That is objected to as assuming a great deal that is not in evidence.

Mr. Cooper: We have a right to assume things that are not in evidence on cross examination.

(Testimony of Oscar Cummins)

The Court: I think the question asks the witness to testify to what was in the minds of the studio officials, and I think the objection is well taken.

Mr. Cooper: I am asking what his state of mind was.

The Court: What was the question?

(Question read by the reporter.)

Mr. Cooper: I will withdraw it.

Q. By Mr. Cooper: You believed, did you not,—I am asking for your belief—that the studio was anxious to [273] use his services?

Mr. Roth: Objected to as immaterial, whatever his belief was, and all the evidence is to the contrary, and the statement made in counsel's own brief was to the effect that they didn't think they could get his services.

Mr. Cooper: That is true, but they wanted them, nevertheless.

The Court: Did you have any fixed belief on the subject?

A. No, I didn't have any fixed belief on that subject.

Q. By Mr. Cooper: Now, on May 26th, when you made the request for the check, you were told, were you not, that there was no check for Bob Cummings, that he was on suspension? A. That is correct.

Q. Why did you have these other people call up afterwards?

A. I just told you that I couldn't believe that a studio that had professed such a great interest in a man and made all the promises they made would keep him under suspension, when they knew that legally they had to put him back on salary.

Q. Why didn't you call Ed Muhl?

(Testimony of Oscar Cummins)

Mr. Roth: Objected to as immaterial. There was no duty to call Ed Muhl, and the state of mind of the witness is immaterial.

The Court: It is not clear to me why either the [274] plaintiff or anyone representing him was called upon to take up this matter further with Mr. Muhl or any other representative of the studio. I may have missed something in the evidence, but my present appraisal of it doesn't point out wherein there was any duty or obligation to call on any of the officials.

Mr. Cooper: If your Honor please, this is an equitable action. They are not asking for relief at law. They are asking to have this contract terminated. They must come into a court of equity with clean hands, and all of their actions must have been in good faith. It certainly goes to the good faith of this witness, whether or not at all times in the past all matters of this sort were taken up with Ed Muhl and the contract department, and he knew it. There is testimony here to that effect.

The Court: Very well. I still don't grasp what there is about equitable principles with respect to a contract and the termination thereof on the part of one of the contracting parties, where, if a breach has been committed by one side, the other is called upon to do anything. That may have been a method of, shall we say, repairing the breach.

Mr. Cooper: That is correct.

The Court: But I am still at a loss to figure out wherein, either upon principles of good faith or any other legal doctrine, the party injured as the result of an [275]

(Testimony of Oscar Cummins)

alleged breach by another party, is called upon to do anything further about it.

Mr. Cooper: Well, if your Honor please, the point that I make is this: Had he gone to Ed Muhl or any of the persons who had the authority to do it, he knew, and he knows it in his heart right now, that they would have given him the check immediately, if he had told them that he was ready, able and willing to work.

The Court: Isn't that an argument to be made, perhaps, when we come to appraise the evidence? Now, it seems to me that at least this much has been made clear by one or more of the defendant's employees; the studio took a position to the effect that the plaintiff was suspended, according to the defendant's theory and according to the testimony of some of its witnesses, first, that the plaintiff was suspended for the time required to complete the picture "Fired Wife"; and, secondly, he was suspended for the duration of the war.

Mr. Cooper: May I interrupt, your Honor, on that point?

The Court: Well, let me state, shall we say, my appraisal of the evidence as I presently see it, because it may help us in determining the matter.

Mr. Cooper: Yes.

The Court: My recollection is not clear as to which of these employees actually issued the order for the suspension, but the suspension was for the duration of the war, according [276] to the testimony, at least, as I construe it. Now, I am at a loss to know upon what legal principle the party adversely affected thereby was called upon to try—

(Testimony of Oscar Cummins)

and perhaps failed, but at any rate it is purely speculative—to try to convince his employer to change his position.

Mr. Cooper: Well, for this reason, if your Honor please—the part I wanted to interrupt your Honor about was this, but sometimes when I don't interrupt on a particular point I forget it later—Your Honor says the studio suspended him, first, during the period that would be necessary for someone else to portray the role of "Hank," and, secondly, for the duration. I don't know whether it makes any difference in your Honor's mind which came first, but the notice said, first, that he was suspended for his failure to report, and, secondly, he was suspended for the period it took to portray the role. I don't know whether it makes any difference in your Honor's mind.

The Court: No, it does not.

Mr. Cooper: But I thought maybe your Honor placed some significance on it.

The Court: Perhaps we can say that in speaking off-hand we are not altogether accurate in our choice of phraseology. What I had endeavored to say was that one or more of the studio officials, according to their testimony suspended the plaintiff, if not on two different dates, at least have undertaken to tell us for two periods. The first of the two [277] periods—I am not speaking now as to chronology—but one of the periods related to or embraced the time required to produce the picture "Fired Wife," and the other period embraced the period that would be represented by the duration of the war.

Mr. Cooper: That is correct, if your Honor please. However, it appears, I think fairly, from the evidence that

(Testimony of Oscar Cummins)

during the period in question the plaintiff was in fact available. His military status, or whatever his status was, from his testimony, appeared to be that he was, nevertheless, ready, able and willing to work. Now, again, of course, I do not know, and maybe your Honor does not now know, what view your Honor is going to take of the evidence.

The Court: Let me reassure you by saying that I have several questions that I am going to suggest should be clarified by some additional evidence.

Mr. Cooper: I understand.

The Court: It may comfort you to know that I haven't reached a decision.

Mr. Cooper: I understand, your Honor. But my point is this: It is the defendant's position that they were led to believe, whether it was true or not, that he was going to be unavailable to them for the duration of the war, and it is our contention that that belief was justified, first, by statements made by the plaintiff, Robert Cummings, and, second, under our view of the evidence, by this witness. [278] Now, I think we have a right to assume, notwithstanding his denial, if your Honor please, that he told them that, and now he is taking the position in his testimony that he was in fact available, and it seems to me we have the right to inquire, we have the right to show that, in fairness and in good faith, and in decency and in law, actually it was his duty to communicate that situation to the persons that he had always discussed it with before, who had the right and the authority to put him back on the payroll.

(Testimony of Oscar Cummins)

The Court: Now, will you, at least, reframe the question as you think it should be?

Mr. Cooper: I have forgotten now what the question was.

Q. By Mr. Cooper: You have stated that you came there expecting the check; is that correct? A. Yes.

Q. You expected that there would be a check available for you, notwithstanding the notice of May 18th?

A. Absolutely.

Q. And when you had these other people call up, you expected still that there would be a check, did you?

A. I did, from the professions of great interest that they had shown in Bob, how they were going to try to make him a big star, that the check would be there.

Q. On May 26th you were told personally that he was on suspension? A. Yes. [279]

Q. On May 18th, you received the notice of May 18th?

A. Yes.

Q. So when you instructed these people to call upon the 27th, and when you listened in, you fully expected that there would be a check; is that correct?

A. Yes, sir.

Q. Is that your testimony? A. Absolutely.

Q. Didn't you have in your mind at that time—weren't you trying to figure out—weren't you trying to abrogate that contract? A. Absolutely not.

Mr. Roth: That is objected to as immaterial.

A. As a matter of fact, I did everything in the world to try to keep peace at the studio.

(Testimony of Oscar Cummins)

The Court: Let me interrupt to ask the witness: You used the expression "peace at the studio." Peace between whom?

A. If your Honor please, Bob was being constantly referred to as a dirty son-of-a-bitch by Dan Kelley and Bob Speers.

The Court: I didn't ask for the details.

Mr. Cooper: I move to strike the answer.

The Court: Let the answer go out. I merely asked "peace between whom?"

A. There had been all kinds of comment as to what they [280] were going to do for Bob.

The Court: Let that answer go out. I am not asking for the background. I am merely asking you to identify the persons between whom you were seeking to maintain peace.

A. I was trying to keep a good relation and understanding between Mr. Kelley and Bob. I even consulted—

The Court: Well, I don't want any more information than that, because I think you have answered the question.

Q. By Mr. Cooper: Isn't it a fact, Mr. Cummins, that on May 28th you had the following conversation with Edward Muhl?

Mr. Roth: Objected to as having been asked and answered.

Mr. Cooper: If your Honor please, I asked him if he had a conversation on May 28th, and the objection that it has been already asked and answered is not a proper objection on cross examination.

(Testimony of Oscar Cummins)

Mr. Roth: Furthermore, it is not proper cross examination. I asked the witness several direct questions which were designed to rebut evidence already put in. Now, counsel stood up and read that transcript of the conversation of May 28th, the same transcript that he has in his hand now, and is going to read it again.

Mr. Cooper: Maybe you are right. I am not going to waste time on that if it has been answered.

Q. By Mr. Cooper: When was the last phone conversation you say you had with Ed Muhl before, we will say, the 1st of June? [281]

A. I think that was the day before I had luncheon with him and the captain, the one in the offices at the studio, the 25th—it was either the 24th or the 25th, because he called me for a luncheon engagement. That would be May, not June.

Q. Do you recall the conversation of June 3rd?

Mr. Roth: Just a moment.

Mr. Cooper: I will withdraw that, then. I was trying to save time.

Q. By Mr. Cooper: Do you have in mind the conversation that Edward Muhl and Emmett P. Ward had with you on June 3, 1943, at their office?

A. There was a conversation in Ed Muhl's office.

Q. In view of the previous objection—did you hear Ed Muhl testify with respect to that conversation of June 3rd?

A. Yes.

Q. Was his testimony with respect to the conversation of June 3rd in his office, at which Emmett Ward was present, substantially correct?

A. Partially correct.

(Testimony of Oscar Cummins)

Q. Can you point out to us wherein anything was incorrect in that answer?

A. If you will give me a copy of the memorandum—

Q. I will be very happy to do so. (Handing same to the witness.) [282]

A. This is absolutely incorrect, where he says that I stated, when I talked to him over the telephone last week, that I had known nothing about the position that was being taken by Cummings. There was no such discussion, and no such discussion took place at all.

Q. What else in there is incorrect?

A. There was no mention of a former Justice of the Supreme Court.

Q. Was there a mention of a former Judge of the Superior Court, then? A. No.

Mr. Cooper: May it be stipulated that the present counsel, Lester Roth, was a former Judge of the Superior Court?

Mr. Roth: Yes.

A. He says here that I said that we had two girls in the office to take down the conversations. That is not true.

Q. You told him you had one girl take it down?

A. Yes, I told him that. This notice part was stricken out?

Q. Yes, that was stricken out.

A. And there was no mention of any such thing as Mr. Cummings' plan—there was no such discussion.

Q. There was no such discussion about that?

A. No.

Q. You have reference there to that portion?

A. Where he claims there was a plan by Mr. Cummings. [283]

(Testimony of Oscar Cummins)

Q. Meaning you?

A. Meaning Bob. And there was no such discussion as to a deliberate effort to "entrap us"; no such talk took place at all. Now, the last paragraph, where he says there was a wild line, that didn't take place at that meeting at all. That took place in the telephone conversation when Eddie Muhl—I think it was at the beginning of the picture "Fired Wife"—called me and said there was a line in the picture that Bob had just completed, called "Flesh and Fantasy," that there was a wild line in there that they wanted Bob to appear to make, and I said, "If you will advise me when you want him I am certain he will be there." And there were other things that took place which are not in this memorandum.

Q. Before we go into that: Aside from those things that you have pointed out, the balance of the conversation was substantially correct?

A. Substantially.

Q. Except that there was something more said, obviously?

A. Yes.

Q. And those things were, first, that you didn't state to him, when he talked to you over the telephone last week, that you actually had known nothing about the position being taken by Bob Cummings?

A. That is right. We never even discussed that.

Q. And the second thing is that you mentioned nothing about having taken the matter up with a former Supreme Court [284] Justice or Superior Court Judge? That wasn't discussed?

A. No. Then there was something else in there.

Q. I am going to go ahead. And, third, there was nothing about Mr. Cummings' plan or an effort to entrap the studio?

A. No such discussion at all.

(Testimony of Oscar Cummins)

Q. And, fourth, there was no conversation about a wild line? A. No.

Q. Aside from that, the balance of it is substantially correct? A. Yes.

Q. With such additions as you might care to give?

A. Yes.

Q. You may give them.

A. I called Eddie Muhl on the phone—

Q. Just a moment.

A. —and told him that I would like to see him.

Q. May I interrupt just a moment? While you are on that telephone call, let me show you a transcript of that telephone call and ask you to read that, and ask you if that is incorrect in any particular.

Mr. Roth: What telephone call is that?

Mr. Cooper: June 3rd. You have seen it, counsel.

Mr. Roth: I will look at it, if I may, your Honor. Yes; I remember. I read that. [285]

A. I think this is substantially correct. I don't have any memo of this.

Q. I mean, there is nothing in there that sounds out of line? A. I don't think so.

The Court: Does that purport to be a memorandum of a telephone conversation held on June 3, 1943?

Mr. Cooper: At 12:32 p. m.

The Court: Between this witness and Mr. Muhl?

Mr. Cooper: That is correct, on the telephone.

Q. By Mr. Cooper: Now, you may proceed.

A. I came over to Ed Muhl's office, and I went in to see Eddie first, and subsequently Bud Ward came in, and I told Eddie that I was always trying to create a good relation between the studio and the stars, that I didn't like these things, and he said, "Yes, Oscar, you have been

(Testimony of Oscar Cummins)

wonderful," and I said, "Isn't there some way we can work out an understanding whereby Bob can come back without the necessity of going through a lawsuit?" And he said, "What have you got in your mind?" And I said, "Well, I would like to see some kind of a picture deal worked out so that everybody will be happy." And he said that as far as he was concerned, representing the studio, that they had already taken a legal position and they were going to stand by it, he didn't care whether there was a lawsuit or not.

Q. Or substantially that? [286]

A. In substance like that, yes.

Q. Anything else?

A. There was a lot of talk, personal conversation. That was the chief thing about the whole conversation.

Q. May I ask you, how many affidavits did you file in this case? This is preliminary, if your Honor please, to another question. I have two in my file.

Mr. Roth: There may have been three altogether. There were two supplementary affidavits, because after your affidavit came in I had to file replies.

A. I think there were three.

Q. By Mr. Cooper: Was there an affidavit by you—

Mr. Roth: Here is one, here is two, and here is a supplemental affidavit.

Mr. Cooper: No further cross examination.

Mr. Roth: No questions. That is all.

The Court: It is not clear to me—perhaps counsel recall and can answer this—Did any witness, or, rather, does the testimony disclose the identity of the particular official or employee of defendant who issued what I think has been referred to as the order of suspension?

Mr. Cooper: It is my recollection, first, that Mr. Dan Kelley stated that when Bob Speers told him about this conversation, he told him to put him on suspension and send him a telegram, and that he mentioned the contract department, or left the wording of it to them. Then there is testimony [287] of Emmett Ward that he prepared the letter of May 9th, and took that matter up with the head of the contract department, Mr. Ed Muhl, who ultimately testified that he was the one who sent out the notification. He testified that he put him on suspension. That is my recollection of the testimony. Is that substantially correct?

Mr. Roth: I think that is a fair statement, your Honor.

Mr. Cooper: That is my belief as to the state of the record.

The Court: I want to make sure that I know to whom you are referring when you speak of "he." You mean Ed Muhl is the one who placed the plaintiff on suspension?

Mr. Cooper: That is my recollection, your Honor. I think, if your Honor please, there is testimony by Emmett Ward that he first placed him on suspension. You recall he testified with respect to Oscar Cummins coming in and he told him that he had placed him on suspension as of April 9th.

Mr. Roth: I think Emmett Ward testified that after he left Dan Kelley's office he went back to his department, and then called up the paymaster's department and ordered

that Mr. Cummings be put on suspension. I think that is the direct testimony from Ward. I think Muhl testified that he went over all the notices and O.K.'d all the notices before they were sent.

Mr. Cooper: That is right.

Mr. Roth: And I think Kelley testified that when Speers [288] came in and told him about the conversation the second time, that he called in Ward and told him to place Cummings on suspension, and that then Ward followed through. I think that is substantially the testimony.

The Court: During the trial I gathered the impression that defense counsel has shown the plaintiff's counsel portions of defendant's files relative to various matters pertaining to the plaintiff and his employment by the defendant. I am prompted to ask whether such disclosures included anything in the nature of a written record of this suspension of the plaintiff.

Mr. Cooper: A written record of the suspension?

The Court: Yes.

Mr. Cooper: The only written record of the suspension that I know of would be the notices that have been mailed.

The Court: I am referring to something in the files of the defendant over and beyond those notices.

Mr. Cooper: I have the file here, if your Honor please, which I will have no hesitancy in showing to counsel. I read everything in it. I do not recall anything other than the notices.

Mr. Roth: That is incorrect. Counsel has not shown me the files, and neither have I asked counsel to see his files. At one stage of the proceeding, I think in connection with the examination of Robert Speers, there was a question as to whether or not Mr. Speers had certain

information from the [289] data or memoranda in the files of Universal, and at first I thought he said yes, he had referred to some data or memoranda, and he was indicating files of Universal, but Mr. Cooper indicated that he did have files of Universal, and showed me a letter, which apparently had refreshed the recollection of Mr. Speers. That was the letter of April 9th, which is now in evidence as an exhibit. Subsequently, the court will recall, Mr. Speers testified that he didn't use that letter to refresh his recollection, but that what he had used was a memorandum which he had dictated on July 2, 1943. That is the extent to which I have seen the files of the defendant or defense counsel, other than the transcripts of these conversations, which have been proffered to the various witnesses, and they were shown to me before they were shown to the witnesses. That is all the files I have seen. That is what I thought the court had in mind.

The Court: That is what I had in mind. I had observed that something was being shown to you, apparently, from the defendant's files, but I didn't know how much.

Mr. Cooper: I was only showing him those things that he has mentioned, which I felt he had a right to see. But I will say this, that I do not know just exactly what your Honor has in mind with respect to an order of suspension, or a written notice of suspension.

The Court: I didn't know whether or not, in addition to these notices, the defendant had made some sort of a record. [290] It has been brought out that some of the defendant's officials or executives from time to time made records of one kind or another, and it occurred to me to inquire whether or not, over and beyond these notices and telegrams, one of these executives had also made up

some type of record as to what has been referred to as the suspension order.

Mr. Cooper: No. If your Honor please, I am fairly familiar with these files; I have, in fact, worn them out; and it would have been contained in this file which I have here, file No. 3, and the only thing in the nature of notices, that contains the notice of suspension, are the affidavits of mailing and the returns, and things of that sort. Those are the suspension. It is my impression that when they put a man on suspension they merely call the payroll department and put him on suspension for some time, or they may send a notice. Would your Honor like some testimony on that?

The Court: No. There has been testimony as to what was done here, and I was interested to know whether, among the records that were kept by one or more of the executives of the defendant, there was something additional, of the character that I have outlined, and apparently you are under the impression that there was nothing further.

Mr. Cooper: That is correct, your Honor. Maybe I am wrong. He (Mr. Erlich) says the payroll department would have a record of the suspension, in the payroll department.

The Court: Would that be anything more than just simply [291] a notice to the effect that the plaintiff was suspended?

Mr. Erlich: That is all, your Honor.

Mr. Cooper: And the period of time would be on there too.

The Court: It would?

Mr. Cooper: Yes, your Honor.

The Court: That, I think, has been made sufficiently clear. Then there is something further. The testimony has referred to the fact that some time in 1942 the plaintiff joined the Civil Air Patrol and continued as a member of that service until some time in the year 1943, and that during the same period he portrayed various roles in various motion pictures. I think it is pertinent to inquire, firstly, the period included during the making of these various pictures, in 1942 and 1943, and also the period when the plaintiff was absent from Los Angeles in connection with the performance of his duty or service pertaining to the Civil Air Patrol, between the time that he joined the Civil Air Patrol and May 26, 1943. Am I correct that this morning, when the plaintiff was recalled to the stand, he was asked whether, during some particular period, he had received written permission from the defendant to leave Los Angeles?

Mr. Cooper: My recollection of that is that he was asked if at any time he ever received permission from Universal to leave Los Angeles, written permission. Is that your recollection?

Mr. Roth: I think substantially so. [292]

The Court: Mr. Reporter, will you turn back to your notes relative to the testimony of the plaintiff when he was recalled this morning?

Mr. Cooper: May I clear that up, if your Honor please?

The Court: Just a minute. Let the reporter look at his notes. It may be of help to you also.

Mr. Cooper: All right, your Honor.

(Record read as requested, by the reporter.)

The Court: That is broad enough to include the entire period of the contract.

Mr. Roth: Yes. I missed it before.

The Court: Now, that question prompts another, or at least that testimony suggests another question. Having in mind the testimony of at least one, if not more, of the witnesses called by the defendant, to the effect that that particular executive was aware of the fact that the plaintiff was a member of the Civil Air Patrol at least for a period of some months prior to April, 1943—

Mr. Roth: May I suggest to the court—

The Court: Just a moment. Let me finish the question. Is it the position of the defense that at no time prior to April, 1943, was it aware of the fact that the plaintiff, upon occasions, engaged in a type of activity apparently connected with the Civil Air Patrol, which took him away from Los Angeles?

Mr. Cooper: If your Honor please, that I am unable to [293] answer. I will state, however, the reason the question was asked, and, very frankly, why I inquired particularly. The burden of proof is on the plaintiff to show that he, at all times, was ready, able and willing to perform. It is the testimony of the plaintiff on the witness stand that he didn't know where he was during that period of time, and it will be our contention that the plaintiff has failed to prove that he was ready, able and willing to perform. Plaintiff must prove that he was in Los Angeles during that period of time. And, assuming, may it please the court, that it will be the contention that there may have been a waiver in the past of the provisions of the contract, a waiver of prior breaches, and not a waiver of subsequent breaches, that has particular reference, if your Honor please, to the period between May 18th and May 29th, and—

The Court: Having in mind that we have asked for certain information, I would like to inquire as to when

we might expect a response, either in the form of a stipulation or evidence in some shape.

Mr. Cooper: If your Honor please, I am satisfied that, with respect to the information your Honor wanted from Universal, that we could have that in written form, in a form, I am satisfied, that plaintiff would stipulate to, some time this afternoon or tomorrow. With respect to the questions addressed to plaintiff, we have caused an investigation to be made of the whereabouts of the plaintiff during [294] that period of time, by private investigators, but we have been unable to obtain all of the specific information that we wanted, and possibly, with plaintiff's assistance, we can find out the facts, for the benefit of both parties.

Mr. Roth: Your Honor will recall that Mr. Cummings testified yesterday that he thought all that could be ascertained, as to where he was on different days, from a log which was kept at Oxnard. I assume we should adjourn, to get that information within 24 hours and have it here. Of course, if we have that information we will be happy to furnish it. But I want to state at this time that we do not agree with the position which the defendant has just asserted, that the plaintiff had to be ready, willing and able at all times. We know there is a provision in the contract which requires him to be available. We also know that the contract provides that he is supposed to give notice; and Mr. Cooper introduced a writing, signed by Robert Cummings, which shows that the notices have to be sent to Oscar Cummins, and Robert Cummings himself testified that he could have been in Arizona and Northern California and back in Los Angeles on the same days. And the fact that he may have been in and out of Los Angeles we consider of no great importance to the case, if he was in touch with

Los Angeles and in touch with the place where the notices of the defendant would have to be sent. That is as to availability. There is nothing in the contract which requires the plaintiff to be physically present [295] in Los Angeles at all times.

The Court: Perhaps I should have enlarged the inquiry to show not merely the dates when the plaintiff was absent from Los Angeles, but the places where he was when he was absent. I think, in fairness to both sides, I should point out why I am interested in these matters that have to do with the period antedating April, 1943. We are all familiar with the principle that it is rather the course of conduct of the parties than their words which most likely reflects the truth. We know that, in spite of the claims of some police authorities that there is no mechanism, physical or mental, whereby one can say with certainty whether an individual, whether he be on the witness stand under oath or elsewhere, is telling the truth. Naturally, the longer we are engaged in the courtroom the more likely we are to become proficient at least in applying those psychological tests, that we know are not infallible. We get our impressions from the manner of witnesses on the stand, how they react, and also from observing in the courtroom others who apparently are involved in or affected by the testimony being given on the stand, but even then one can be mistaken. We naturally seek to test the statements by their reasonableness and various other factors. It has been, at least, my personal experience that the safest of all, shall I say, devices or tests is what the parties did when they were not expecting a lawsuit. At least I had some questions in my mind that I [296] think I can help resolve by getting this additional data from both sides.

Mr. Roth: We will be glad to get it, your Honor. I was going to suggest this to Mr. Cooper. In order to avoid putting Robert Cummings back on the witness stand—I don't know what the condition of his log is at Oxnard. Is that where it is—at Oxnard?

Mr. Robert Cummings: Yes.

Mr. Roth: If we had a transcription of that log made, we could phone for it and have it sent down here.

Mr. Cooper: We can have Mr. Addison drive him up.

Mr. Roth: Is he an investigator?

Mr. Cooper: That is the investigator.

Mr. Roth: He is good company, Mr. Cummings.

Mr. Cooper: He is a pretty nice fellow.

The Court: Then, too, if we can get that, say, by tomorrow, it occurred to me, while these matters are reasonably fresh in our minds, that we might have the case argued.

Mr. Cooper: Today?

The Court: No—after this evidence is supplied.

Mr. Cooper: Then may I make this suggestion, if your Honor please: I am satisfied that we can have that information—don't you think we can have it by tomorrow morning? Can you leave this afternoon?

Mr. Robert Cummings: I may possibly be able to get someone in Oxnard to go there and get it. It may be possible [297] to do that without having to go.

Mr. Roth: We will arrange one way or another with Mr. Cooper to get that this afternoon and have it here tomorrow.

Mr. Cooper: And we will have the information that your Honor wants tomorrow morning.

Mr. Roth: I would like to have that.

Mr. Cooper: We will phone you.

The Court: Then can we have the argument tomorrow?

Mr. Cooper: I hope so, because I have a trial on Tuesday, and I have a lot of work yet unfinished.

Mr. Roth: It is satisfactory to me. May I suggest this: We have both filed rather voluminous briefs here.

Mr. Cooper: Too voluminous on both sides.

Mr. Roth: I imagine too voluminous on both sides, and, rather than argue questions of law, I don't feel that there is much that I can add to the legal analysis I have already submitted. If the court asks questions, of course I would want to answer those questions. But I felt that the argument should be confined to the facts, the evidence submitted, and such legal conclusions and principles as we want to draw from the facts or apply to the facts. But I am ready, if the court deems that it will be in the least helpful, to argue the case, both from its legal standpoint and from its factual standpoint.

The Court: Essentially I think the argument ought to deal with the facts, and I think, as a part of the argument, [298] either at its inception or at its conclusion, that each of you might, by way of explanation, outline what we will probably call the principal probative facts that you contend have been established by the evidence, and which, if true, would warrant the application of one or more of the legal principles which are suggested in the pre-trial briefs.

Mr. Roth: That is entirely satisfactory to me.

Mr. Cooper: That is entirely satisfactory. If your Honor please, there is one thing. There have been one or two points raised that I have not touched upon, and I would perhaps like the privilege of arguing those orally, with such additional authorities as I have at that time.

The Court: I probably omitted to say that if you feel that the briefs have raised some legal questions upon which you wish to comment, naturally you will be free to do so. Then the case will be resumed in the morning at 10:00 o'clock.

Mr. Cooper: Very well.

Mr. Roth: Before we go: Do I understand that the court wants this log from the time Mr. Cummings went into the Civil Air Patrol up to the present time?

The Court: That is correct. It is not clear in my mind whether the log discloses the places as well as the dates.

Mr. Roth: If it does, we will have that information.

The Court: Very well.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Friday, January 7, 1944.) [299]

— — —

Los Angeles, California, Friday, January 7, 1944; 10 A.M.

(Parties present as before.)

The Court: May I inquire of counsel, relative to Defendant's Exhibit A—perhaps counsel would like to look at it—is that a mimeographed form?

Mr. Cooper: Signed by Robert Cummings.

The Court: And where was such form prepared?

Mr. Cooper: I do not know, but I assume it was probably prepared in the studio. I don't know, but I will find out, if the court please. I have the fact now, if your Honor please. I will have to offer a stipulation.

I have been informed that this form is prepared at the studio.

Mr. Roth: That is stipulated.

The Court: Now, are we to have some further stipulations or evidence?

Mr. Cooper: If your Honor please, pursuant to your Honor's suggestion, we have had prepared, and have handed counsel a copy, a record of Robert Cummings' services under the contract of November 21, 1938, showing the first photoplay in which he portrayed a role, beginning in May of 1941* (1939), to and including the last date of his services, which was March 23, 1943, and we show the actual days that he worked. It is our understanding that your Honor was interested in the time since Pearl Harbor, particularly. Counsel has a copy of that. Will your Honor inform me if it [300] covers the points that your Honor has in mind?

Mr. Roth: And we have, may it please the court—

The Court: Before you go into the next matter, may I inquire whether the dates noted on this document just handed to me approximately include the entire period during which the plaintiff rendered any type of services connected with the particular picture referred to?

Mr. Cooper: Do you mean—

The Court: In other words, do these dates relate only to what I have heard described as the shooting period, or do they include something more than that?

Mr. Cooper: I will inquire. If your Honor please, Mr. Muhl has heretofore been sworn, and he may answer that question.

The Court: Very well. [301]

EDWARD MUHL,

a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

The Witness: Those dates represent the commencement and the finish of the shooting period. Conferences or discussions, or anything like that, would not be shown there.

The Court: Do your records disclose the periods when the plaintiff appeared at the studio in connection with these other matters, these other services?

A. No, sir; I don't believe there would be any consistent record of that. This is a production office record, which actually is taken from the history of the shooting. Mr. Cummings might have come to the studio voluntarily or in response to telephone calls, or to see somebody, from time to time, and there wouldn't be any record; it wouldn't show visits of that sort.

The Court: Suppose you take the stand again.

The Witness: Yes, your Honor.

The Court: I gathered from the testimony already in the record that an actor, such as the plaintiff, would devote time toward rendering services in connection with a picture preliminarily to the actual shooting thereof, and likewise following the completion of the shooting of the picture. Don't you have any records to indicate when, for example, the artist is at the studio in connection with these preliminary and later services? [302]

A. Well, I believe there would be no consistent record. For instance, if I understand you correctly, you

are referring to appearances for discussions of a role with a director or producer, or perhaps fittings for wardrobe, or appearing for the taking of publicity photographs and things of that sort, when those things would take place in different departments, and, to the best of my knowledge right now, the only record showing the presence of the actor on the studio lot would be the gate record, that is, as to whether he drove in on the lot that day, and what time he came in and went out, and the departments themselves would normally go through and do whatever work was necessary without keeping a register of it, of who appeared. My understanding was that we wanted a record of the appearances in connection with the shooting of the photoplay.

The Court: As a matter of fact, my inquiry was intended to be more comprehensive.

Mr. Cooper: That was my fault, your Honor. Those were the instructions that I gave them.

The Court: In other words, even if you furnished a copy of what you call your gate records, there would be no way of telling from such entries whether the artist came in at the request of the studio or merely because he was supposed to come there and talk about something.

A. That is correct. The record wouldn't show that; it wouldn't show the purpose of his presence on the lot. If I [303] can volunteer this information, I think everyone concedes that this is correct, that during the shooting period an actor generally reports in response to a telephone call, and in connection with the publicity department's use of his services, and most of those appear-

ances would be in response to an informal telephone request from the person or department for his presence, and he would normally report in response to that request.

The Court: Does your studio have a record, for example, of when such requests are made by any of the departments other than, say, the department that is engaged in actually shooting the picture?

A. No, sir. I am quite sure I would be unable to create or get together any kind of a positive or definite or satisfactory record as to those, what we might call, collateral services.

The Court: Then, as I understand it, this document gives the opening date and the closing date of the shooting of each of the pictures listed in the document?

A. Yes, your Honor. And commencing in May, 1941, down a little toward the bottom of the record, the actual days when he was present and when he was not required to be present, etc., are shown.

The Court: So that we will have the record clear, let us first mark the document as defendant's exhibit next in order. It will become Defendant's Exhibit E. [304]

[DEFENDANT'S EXHIBIT NO. "E"]

1-6-44.

ROBERT CUMMINGS

Contract of November 21, 1938

Record of services rendered in:

	Started		Finished
"The Underpup"	5-15-39	to	7-7-39
"Rio"	8-11-39	to	9-1-39

20th Century-Fox Loanout:

"Everything Happens At Night"	9-11-39	to	10-26-39
"Charlie McCarthy, Detective"	11-1-39	to	12-11-39

Loew's Incorporated Loanout:

"And One Was Beautiful"	2-8-40	to	3-2-40
"Private Affairs"	4-11-40	to	4-24-40
"Spring Parade"	6-8-40	to	8-12-40
"One Night In The Tropics"	8-28-40	to	9-30-40

Loew's Incorporated Loanout:

"Free And Easy"	12-23-40	to	1-11-41
	1-24-41	to	1-31-41

Frank Ross-Norman Krasna Loanout:

"The Devil And Miss Jones"	1-13-41	to	2-12-41
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20th Century Fox Loanout:	3-11-41	to	4-11-41
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[248]

(Defendant's Exhibit E)

	Days Worked	Days Off
"It Started With Eve"	May, 1941 27, 28, 29, 31	May, 1941 30 Holiday
	June 2, 3, 4, 5, 6, 7, 14, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30	June 1 Holiday 8 Sunday 9, 10, 11, 12, 13 15 Sunday 23, 24, 25, 26, 27 Sunday
	July 1, 2, 3, 5, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23	July 4 Holiday 6 Sunday 7 13 Sunday 20 Sunday
At Warners:	24 and 25	
"It Started With Eve"	26, 28, 29	27 Sunday
At Warners:	30	
"It Started With Eve"	31	
	August 1, 2	August 3 Sunday
At Warners:	4	
"It Started With Eve"	5, 6, 7,	
At Warners:	8, 9, 11, 12, 13, 14, 15, 16	10 Sunday 17 Sunday
"It Started With Eve"	18, 19, 20, 21, 22, 23	24 Sunday

Defendant's Exhibit E)

At Warners:	25, 26, 27, 28, 28, 30	31 Sunday
	September	September
At Warners:	2, 3, 4, 5, 6,	1 Holiday
		7 Sunday
"Started With Eve"	8, 9, 10, 11, 12	13
		14 Sunday
At Warners:	Sept. 15 to Oct. 7,	October 8, 1941 to
	1941, inclusive.	December 17, 1941
		[249]

	Days Worked	Days Off
aboteur"	1941	1941
	December	December
	17, 18, 19, 20, 22,	21 Sunday
	23, 24, 26, 27, 28,	25 Holiday
	29, 31	28 Sunday
		30 ill
	January 1942	January 1942
	2, 3, 5, 6, 7, 8, 9,	1 Holiday
	10, 12, 13, 14, 15,	4 Sunday
	16, 17, 19, 20, 21,	11 Sunday
	22, 23, 24, 26, 27,	18 Sunday
	28, 29, 30, 31	25 Sunday
	February	February
	2, 3, 4, 5, 6, 7, 9,	1 Sunday
	10, 11, 12, 13, 14,	8 Sunday
	16, 17, 18, 19, 20,	15 Sunday
	21, 26, 27, 28	22 Sunday
		23, 24, 25

(Defendant's Exhibit E)

March

2, 21,

March

1 Sunday

3 to 20 inclusive

Mar. 22 to Apr. 27,
incl.

"Between Us Girls"

April

28, 29, 30

May

1, 2, 4, 5, 6, 7, 8, 9,

12, 13, 14, 15, 16,

18, 19, 20, 21, 22,

25, 26, 27, 28, 29

May

3 Sunday

10 Sunday

11 off

17 Sunday

23 off

24 Sunday

30 Holiday

31 Sunday

June

1, 3, 4, 5, 6, 8, 9,

10, 11, 12

June

2

7 Sunday

13 off with per-
mission, for
services in
C.A.P.

14 Sunday

15, 16, 17, 18, 19,
20

21 Sunday

22, 23, 24

28 Sunday

30

25, 26, 27, 29

(Defendant's Exhibit E)

July	July
13, 14, 15, 16, 17,	1, 2, 3,
18, 20	4 Holiday
	5 Sunday
	6, 7, 8, 9, 10, 11,
	12 Sunday
	19 Sunday
	[250]

	Days Worked	Days Off
Warners "Princess O'Rourke"	July 21, 1942 to Sept. 8, 1942	
"Flesh And Fantasy"	1943	1943
	March 10, 11, 16,	March
	17, 18, 19, 20,	12, 13
	22, 23,	14 Sunday
		15
		21 Sunday

[Endorsed]: Case No. 3242. Cummings vs. Universal.
Deft's Exhibit "E" in Evidence. Date: 1/7/43. Clerk,
U. S. District Court, Sou. Dist. of Calif. Louis J. Somers,
Deputy Clerk. [251]

(Testimony of Edward Muhl)

I notice on the last page of Defendant's Exhibit E a listing of a picture as "Warner's 'Princess O'Rourke,'" and under the column headed "Days Worked" is a blank, and under the column headed "Days Off" is the entry July 21, 1942, to September 8, 1942. Is that accurate?

The Witness: May I see it?

Mr. Cooper: Here is the original of it. I saw the picture, so he must have worked in it.

The Witness: I was just looking at it. I think the title on that is just out of line, because he was working in two pictures simultaneously.

Mr. Cooper: I apologize for overlooking that, if your Honor please.

The Court: Well, the purpose of the court is to clarify matters of that kind.

The Witness: It is the wrong column. Do you have your copy?

Mr. Roth: Yes.

The Witness: He worked in "Princess O'Rourke"—that should be shifted into the lefthand column. Can I write on this, Mr. Cooper?

The Court: Will you let me have that? What do you say the correct answer should be?

A. He was working in the Warner Bros. picture "Princess O'Rourke" from the 21st of July, 1942, until the 8th of September, 1942. [305]

The Court: Now, should there be anything listed under the heading "Days Off" opposite the picture "Princess O'Rourke"?

A. No. This was at another studio, and we don't have the actual days when he was required to render services and when he was off.

(Testimony of Edward Muhl)

The Court: The dates July 21st and September 8th do not necessarily mean that he worked all of those days?

A. Not necessarily.

Q. By Mr. Cooper: You do not have the record of the actual days he worked and the actual days off?

A. No, I have no record of that.

The Court: For the purpose of the record, let it be shown that I have written in on the last page of Defendant's Exhibit E, under the column entitled "Days Worked," opposite "Warners 'Princess O'Rourke,'" the following, "July 21, 1942, to Sept. 8, 1942," and I have crossed out, in the column headed "Days Off," the notation reading to the same effect. I have no further questions.

Mr. Roth: I think I have one more.

The Court: Very well.

Cross-Examination

Mr. Roth: Mr. Muhl stated that he thought we would all concede that when shooting commenced the notices were by telephone, and that calls such as for wardrobe, publicity, conferences, etc., they were by informal telephone. I don't think I knew that. Is that correct? [306]

A. Informal telephone calls?

Q. By Mr. Roth: In one case they were by telephone, you said, and in the other case by informal telephone call.

A. I didn't mean to distinguish between the two. I meant that, for instance, we tell an artist what time to report on the set in the morning; no formal notice is given; or the director will telephone him and say, "Will you be on the set at 9 o'clock?"

(Testimony of Edward Muhl)

Q. But when you are about to start shooting you actually send a formal notice to the artist of the date, and any other calls for service you just call him by telephone; isn't that so?

A. That can happen in more than one way, Mr. Roth. We might send a formal notice, or a letter, or, if the artist has been in and conferred with you about it and it is well understood what time the services are going to start, they may just come in or be advised by telephone. There isn't any absolute rule on the thing.

Q. The usual procedure is to notify the artist in writing of the formal shooting dates, and with respect to other services the usual procedure is to notify him by telephone?

A. I would say there is no usual procedure of notifying an artist in writing when a role is to commence.

Q. Then it is just as usual to call them by telephone as it is to give them written notice? [307]

A. Yes.

Mr. Roth: That is all.

Mr. Cooper: No further questions. I have one or two further questions.

Redirect Examination

Q. By Mr. Cooper: For example, do you recall an occasion between the dates of January 8, 1943, and February 23, 1943, of sending a formal notice to this particular plaintiff to come in for discussion?

A. Between what dates?

Mr. Roth: We object to that question as improper examination of any kind, and it is not the best evidence.

Mr. Cooper: Well, if it is that important I will get at it—

Mr. Roth: I didn't say it was important.

(Testimony of Edward Muhl)

Mr. Cooper: May I be permitted to put the question and have the court rule on it? The point of the question is this: Counsel inquired with respect to whether it was usual to send a written notice or to telephone with respect to other services. Let me ask you this:

Q. Do you recall ever sending a written notice for this plaintiff to come in for discussion in connection with the role of—

Mr. Roth: Objected to as not the best evidence and not a proper question to inquire about at this time.

The Court: If it deals with the subject matter of a [308] written notice, it would appear that the question really avoids the requirements. The writing itself should be shown.

Mr. Cooper: I think your Honor is correct on that.

Q. By Mr. Cooper: Let me ask you this question: With respect to notices for discussions and wardrobe and things of that sort are there occasions with respect to sending the notices, when you send them sometimes by telephone and sometimes by written communication?

A. Yes.

Q. And, particularly if there is a dispute of some sort, what happens in that sort of a situation?

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial.

Mr. Cooper: If your Honor please, the point I want to show is that there is a usual rule in such a situation.

The Court: Very well. You may answer.

A. If there is some reason to believe that the artist or employee will not respond to the notice, it may be sent in writing, so as to have evidence of the notice having been given. If there is no reason to believe or anticipate

(Testimony of Edward Muhl)

that there will be any difficulty, normally the telephone is resorted to. It is just a matter of reasonable action.

Mr. Cooper: That is all.

Mr. Roth: That is all.

The Court: Now, is there something further?

Mr. Roth: Yes, your Honor. Yesterday at the close of the [309] session the court suggested that we submit the amount of time that had been spent by the plaintiff in his activities in the Civil Air Patrol since being a member of that service, and we have here the log book of Robert Cummings, which shows all his flying time and where he was on particular dates since the 23rd day of May, 1942. We have the original log book, and from the original log book we have transcribed the entries therein, in typewriting, and are prepared to hand it up to the court. They are exact in all particulars. There is only one deviation from the entries in the book, and that is on page 5, line 5, where there is added, after the entry 5-28-43, "Returned to Los Angeles in CAP truck the same evening." The language "Returned to Los Angeles in CAP truck the same evening" has been added. Mr. Robert Cummings told me that that was added because he was asked specifically where he was on that evening or on that day, while on the witness stand, and he remembered by looking at his entries, and added it. Otherwise, the typewritten transcript is the same as the entries in the log. We are willing, of course, to hand the log book up to the court, as well as the typewritten entries therefrom, but we would like to have the log book after the court has finished. We have given a copy of the transcript to counsel.

The Court: May I see the book and the copies? May I ask the plaintiff to take the stand.

Mr. Roth: He just stepped out for a moment. I will get [310] him.

The Court: Would you take the stand, Mr. Cummings?

ROBERT CUMMINGS,

a witness heretofore duly sworn, was recalled and testified as follows:

The Court: Looking at this log book, which we have been told was kept by yourself, is there anything therein that enables you to determine when you began flying as a member of the Civil Air Patrol?

A. Your Honor, the log book wasn't always kept by myself. In other words, sometimes when I flew I would note down the time I flew, as most flyers do, because their log book is very valuable to them and they don't wish to lose it, because it is the only record of their flying time, and this was kept by my wife, because I would bring her home the record of the time I flew, as to the hours and minutes and where I flew, and I would say, "Put this in the log book," and she recorded it there. There is no way in there that I can tell when I joined the Civil Air Patrol, and it would necessarily mean that you are flying at the time. In other words, for a person to join the Civil Air Patrol today it might be said that before he could get an opportunity to fly with them he would have to, first of all, be O.K.'d through Washington and the F. B. I. and checked down the line, and then he would have to go to one of the fields where they fly and [311] have their training and be O.K.'d by possibly the squadron commander or the executive officer, to be allowed to fly.

(Testimony of Robert Cummings)

As a matter of fact, for a long time after Pearl Harbor, and I believe up until possibly May, I did no flying at all, as I remember. We were here in Los Angeles. All flyers were grounded in this area at that time. Even the Civil Air Patrol, which was an organization primarily designed to aid the Army and Navy, from a civil standpoint, the Civil Air Patrol was not allowed to fly in this area. So there is no way actually in that log that I could say when I joined the Civil Air Patrol.

The Court: Now, is it your best recollection that by May of last year you had joined the Civil Air Patrol?

A. May of last year? That would be 1943.

The Court: May of 1943. That is right. This is 1944. The question is, is it your best recollection that by May of 1942, in other words, within, say, five months after our entry into the war, or, as it is commonly referred to, after Pearl Harbor, would you say that you had joined the Civil Air Patrol?

Mr. Cooper: If your Honor please, I have something that may help the witness to refresh his recollection.

Mr. Roth: Just a moment. We don't care for an independent investigation. It is just the witness' recollection.

Mr. Cooper: Counsel, I am in entire good faith. I am sure you will have no objection to it at all when you see it. [312]

Mr. Roth: Unless the witness asks for it, I don't think it should be shown to him, because Mr. Appleton's report, which I have never seen, is undoubtedly based on hearsay, and he is not here to testify.

The Court: I have no other questions.

(Testimony of Robert Cummings)

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, if I suggest to you that the records of group 918, that is, the local section, show that you were a member of the Patrol on May 29, 1942, would that assist you possibly in fixing approximately how long before that you became a member of the Civil Air Patrol?

A. Yes, that would, because of the fact that I was earlier in what was the first Civil Air Patrol squadron, Sheriff Eugene Biscailuz's squadron, which was a group of civil flyers in this area, who used to volunteer their services in time of need, in earthquake, flood or anything, to drop food or anything to people who needed it. I joined the sheriff's air squadron, and that became the first unit of the Civil Air Patrol. That became the first unit of the Civil Air Patrol, because of the fact that they had had more experience in that line of work than anyone else, and when they, as a group, joined the Civil Air Patrol, I went in with them, and the records became pretty few after a while, as I remember, because many of the men in that air squadron were going into the Army, due to Reserve commissions and whatnot, and many of the officers who kept the records have [313] had to leave, and they were handed from one person to another, until, as I remember, I had to make another application for the Air Patrol, as even after I had been notified from Washington, I received word again that I would have to fill out other forms, because they had been lost. But I do know that in May I was a member of the Civil Air Patrol, because, shortly after that, I was asked to take over the command of the squadron, 918-4, which covered the entire San Fernando Valley.

(Testimony of Robert Cummings)

Mr. Cooper: I think that is all, your Honor.

The Court: Anything further?

Mr. Roth: I don't think so.

Mr. Cooper: Your Honor made inquiry yesterday with respect to certain testimony which your Honor desired to have read, and counsel and I have communicated with the reporter, who, I believe, has his notes available on the subject your Honor inquired about.

The Court: The reporter advised me this morning in chambers that he had read over portions of his notes, and apparently had not completed his own reading of the portions desired. I think it would be preferable to proceed with the oral argument, and, in the event that it develops that we need to make further reference, we might then turn back to the reporter's notes. First of all, I daresay we should give an exhibit number to this copy of the flying log of Mr. Robert Cummings. Mr. Clerk, you might return the original [314] log book. We will mark the transcript therefrom as plaintiff's exhibit next in order. That will be No. 3.

[PLAINTIFF'S EXHIBIT NO. 3]

FLYING LOG OF ROBERT CUMMINGS 1942 & 1943

- 5-23-42 (Time: 1 hr., 27 min.) First flight since war.
 Flew over Boulder (City). Shot landings.
- 5-24-42 (Time: 1 hr., 9 min.) Flew to Las Vegas.
 Carried 6 pass. on many trips.
- 8-16-42 (Time: 3 hrs., 20 min) Flew to check Lone
 Pine Field for C. A. P. with Bachtel.

(Plaintiff's Exhibit No. 3)

9-12-42 (Time: 2 hrs. 21 min.) Local and to Kingman and return.

9-13-42 (Time: 3 hrs.) To Blythe and return with Bachtel for C.A.P.

9-13-42 (Time: 59 min.) Four night landings—night flight.

Boulder City to Las Vegas, Nevada.

9-14-42 (Time: 53 min.) Cross wind landing practice. Boulder City, Nev.

9-14-42 (Time: 15 min.) Local, Boulder City.

9-14-42 (Time: 35 min.) Ferried Tank for Bill for 1 night landing.

Boulder City to Las Vegas.

10-11-42 (Time: 47 min.) * Checked out in Culver. Boulder City.

10-11-42 (Time: 1 hr., 10 min.) Local with Lundgren and Dunavant.

Boulder City.

1-12-42 (Time: 1 hr., 14 min.) 6 Pass. over. 3 back. Boulder City to Kingman.

10-30-42 (Time: 1 hr., 44 min.) C.A.P. Ferry Lane opening Los Angeles to Blythe.

Boulder City to Blythe, Calif.

10-31-42. (Time: 51 min.) Flying C.A.P. members. Blythe.

10-31-42 (Time: 1 hr., 22 min.) Local flight Blythe in Taylorcraft.

11-1-42 (Time: 31 min.) Ditto.

(Plaintiff's Exhibit No. 3)

11-1-42 (Time: 30 min.) Local flight Blythe in Cub.

11-1-42 (Time: 1 hr., 3 min.) Flying C.A.P. members.

Blythe.

11-1-42 (Time: 1 hr., 35 min.) Return from Ferry lane.

Blythe to Boulder City.

11-6-42 (Time: 2 hrs., 25 min.) 2nd week — Ferry lane C.A.P.

Boulder City to Blythe.

11-7-42 (Time: 1 hr., 4 min.) C.A.P. flying.

Blythe.

11-8-42 (Time: 1 hr., 30 min.) Return from Ferry lane.

Blythe to Boulder City. [238]

11-16-42 (Time: 1 hr., 19 min.) XC. bringing Whiteman's ship to King.

Blythe to Kingman, Ariz.

11-20-42 (Time: 1 hr.) Practice all maneuvers up to pylons.

Kingman.

11-21-42 (Time: 1 hr., 1 min.) Pylon 8s. (signed)
Richard L Pogue C-106602.

Kingman.

11-22-42 (Time: 1 hr., 35 min.) Pylons and spins.

Kingman.

11-23-42 (Time: 1 hr., 9 min.) Stalls power on & off—
8s—S—Turns.

Kingman.

(Plaintiff's Exhibit No. 3)

11-24-42 (Time: 1 hr., 40 min.) Series of turns, chandelles, 8s—S—Turns—slip.

Kingman.

11-25-42 (Time: 1 hr., 3 min.) 8s—and turns.

Kingman.

11-26-42 (Time: 1 hr., 40 min.) Procedure practice.

Kingman.

11-27-42 (Time: 1 hr., 7 min.) Procedure practice.

Kingman.

11-28-42 (Time: 1 hr., 13 min.) Practiced low to high work solo.

Kingman.

11-29-42 (Time: 1 hr., 17 min.) Practiced procedure low & high solo.

Kingman.

11-30-42 (Time: 1 hr., 3 min.) Low and high work.

Kingman.

12-1-42 (Time: 1 hr., 10 min.) Low & high practice.

Kingman

12-2-42 (Time 1 hr.) Low & high work.

Kingman

12-3-42 (Time: 1 hr.) Chandelles, lazy 8s, stalls, overhead approach

Kingman

coordination ex

12-4-42 (Time 55 mins.) Flew at 9800'—cold—

Kingman to Boulder City.

(Plaintiff's Exhibit No. 3)

12-4-42 (Time: 53 min.) Returned to Kingman
weather lousey.

Boulder City to Kingman.

12-5-42 (Time: 1 hr.) Spins lazy 8s chandelles.
Kingman.

12-5-42 (Time: 45 min.) Lt. Dolan, Audaboni & Ben-
net passengers.

Kingman.

12-6-42 (Time: 1 hr., 17 min) XC King. to Boulder, 3 passengers.

Kingman to Boulder City.

12-6-42 (Time: 42 min.) XC test hop at Vegas of 8 min.

Boulder City to Las Vegas.

12-7-42 (Time: 45 min.) Practice with instructor.
Boulder City.

12-8-42 (Time: 1 hr.) Ditto
Boulder City.

12-9-42 (Time: 1 hr., 20 min.) XC to Boulder and
return.

Kingman to Boulder City.

12-11-42 (Time: 1 hr., 32 min.)

Kingman to Boulder City.

12-13-42 (Time: 1 hr., 29 min.)

Kingman to Boulder City.

12-14-42 (Time: 45 min.)

Kingman to Boulder City.

12-12-42 (Time: 1 hr.) Procedure practice.
Boulder City. [239]

(Plaintiff's Exhibit No. 3)

12-16-42 (Time: 47 min.) Flew with Vivi.
Boulder City.

12-17-42 (Time: 45 min.) With Edwards.
Boulder City.

12-18-42 (Time: 52 min.) " "
Boulder City.

12-27-42 (Time: 1 hr., 15 min.) Procedure practice.
Boulder City.

12-28-42 (Time: 1 hr.) " "
Boulder City.

12-29-42 (Time: 50 min.) " "
Boulder City.

12-29-42 (Time: 45 min.) Took Barre for a ride in side
by side.
Boulder City.

12-30-42 (Time: 1 hr., 45 min.) one hour solo practice.
45 minutes duo.
Boulder City.

12-41-42 (Time: 1 hr., 10 min.) Dual procedure prac-
tice.
Boulder City.

12-31-42 (Time: 1 hr., 30 min.)
Boulder City.

12-31-42 (Time: 47 min.) H. P. rating (15 min. Pete—
32 "Thomas".
Boulder City.

(Plaintiff's Exhibit No. 3)

1-3-43 (Time: 3 hrs.) XC on trip to S.F. for Hogan's plane.

Bus. trip.

Boulder City to Sky Ranch, Reno, Nevada.

1-6-43 (Time: 2 hrs., 58 min.) Return from S. F.
Very cold. Frost on plane.

Reno, to Boulder City.

1-9-43 (Time: 35 min.) Spin practice.

Boulder City.

1-10-43 (Time: 2 hrs., 13 min.) First commercial
charter trip for hire Mr. Patterson.

Boulder City to Phoenix, Arizona.

1-10-43 (Time: 1 hr., 41 min.) Return trip (tail
wind) excellent trip both ways.

Phoenix to Boulder City.

1-11-43 (Time: 31 min.) Checking Carlisle in Cessna.
Boulder City.

1-12-43 (Time: 38 min.) Practicing spins. Vivi as
balast.

Boulder City.

1-13-43 (Time: 45 min.) Testing Cub after engine
repair Barre pass.

Boulder City.

1-15-43 (Time: 1 hr., 5 min.) Flew Vincentes Cub
Barre passenger.

Boulder City.

1-16-43 (Time: 35 min.) Practicing spin. Vivi as
balast.

Boulder City.

(Plaintiff's Exhibit No. 3)

1-16-43 (Time: 28 min.) Vincentes Cub (high wind)
Barre Pass.

Boulder City.

1-17-43 (Time: 37 min.) Spin practice. Vivi balast.
Boulder City.

1-18-43 (Time: 1 hr., 22 min.) Rac'd instr rating from
CAA. Took Hardy and Miller too.

Boulder City to Prescott, Ariz.

1-19-43 (Time: 1 hr., 25 min.) Return (windshield
broken from cold.

Prescott, Arizona to Boulder City. [240]

1-19-43 (Time: 32 min.) First paying student fee ap-
plied to cost of windshield repair.

Prescott.

3-28-43 (Time: 1 hr., 45 min.) Taught Kellogg—
Wardligh and Heimann.

Las Vegas.

3-28-43 (Time: 3 hrs., 55 min.) " Stocktill—Kel-
logg—Heimann—Smith.

Las Vegas.

4-11-43 (Time: 4 hrs., 17 min.) C.A.P. training of
members.

Quartzite, Ariz., returned to Los Angeles by automobile
that night.

4-11-43 (Time: 42 min.) " " " "
Quartzite, Ariz.

4-11-43 (Time: 35 min.) Airport registrar Jennie De-
laney.

(Plaintiff's Exhibit No. 3)

4-11-43 (Time: 20 min.) C.A.P. training.

4-22-43 (Time: 1 hr., 30 min.) Check flight Osborne
War Eagle Feild.

Lancaster, Calif., returned to Los Angeles same after-
noon.

5-7-43 (Time: 2 hr, 33 min.) 1st C.A.P. Ferry lane
Instructs—Dade.

San Dimas, Calif., to Quartzite, Ariz.

5-8-43 (Time: 1 hr., 20 min.) Chandelles lazy 8s
Vivi—C.A.P.

Quartzite.

5-8-43 (Time: 15 min.) Solo check out Brushaber.
Quartzite.

5-9-43 (Time: 4 hrs., 40 min.) C.A.P. active duty
training instruction.

Quartzite.

5-10-43 (Time: 2 hrs., 48 min.) C.A.P. active duty
C.C. training, Wade.

Quartzite, to San Dimas, Calif.

5-19-43 (Time: 5 hrs., 15 min.) Ferry to Vegas Cour-
ier Fl. #57 to Army Base.

Quartzite to Las Vegas to Blythe to Quartzite.

5-20-43 (Time: 1 hr., 55 min.) Beginning instrument
with Ed Horton.

Quartzite.

5-21-43 (Time: 1 hr., 20 min.) Radio orientation.
Quartzite.

5-21-43 (Time: 45 min.) Helen Vincint instruction.
Quartzite.

(Plaintiff's Exhibit No. 3)

5-22-43 (Time: 2 hrs., 10 min.) Forced landing Push
Rod Conner.

Quartzite.

5-22-43 (Time: 2 hrs., 5 min.) C.A.P. instruction to
918-3.

Quartzite.

5-23-43 (Time: 1 hr.) First fairly good job on radio.
Quartzite.

5-23-43 (Time: 1 hr, 55 min.) C.A.P. instruction to
918-3.

Quartzite.

5-23-43 (Time: 1 hr., 25 min.) " " " " .
Quartzite.

5-24-43 (Time: 30 min.) Forced landing prop. at
Herron.

Quartzite to Blythe. [241]

5-25-43 (Time: 50 min.) Student ride John Mann.
Quartzite, Arizona

5-27-43 (Time: 2 hrs., 6 min.) Good air and orientation
work.

Quartzite, Arizona.

5-28-43 (Time: 1 hr., 30 min.)
Quartzite, Arizona

5-28-43 (Time: 25 min.) Check ride George Hyder.
Quartzite, Arizona. Returned to L. A. in CAP truck
same evening

6-2-43 (Time: 1 hr., 52 min.) C.A.P. instruction C.
Kellog at 6 Hrs.

Quartzite, Arizona

(Plaintiff's Exhibit No. 3)

6-2-43 (Time: 1 hr., 38 min.) Parallel to a fade—
air work.

Quartzite, Arizona

6-3-43 (Time: 55 min.) George Hyder.

Quartzite, Arizona

6-3-43 (Time: 50 min.) Kellogg C. C.A.P. instruc-
tion.

Quartzite, Arizona

6-3-43 (Time: 1 hr.) 90-degree method—air work.

Quartzite, Arizona

6-3-43 (Time: 1 hr., 5 min.) Check Dick Greer for
H.P. of 95.

Quartzite, Arizona

6-4-43 (Time: 20 min.) Started Adelaide Hobbs first
flight.

Quartzite, Arizona

6-4-43 (Time: 52 min.) 90-degree method.

Quartzite, Arizona

6-6-43 (Time: 54 min.) Parallel to a fade.

Quartzite, Arizona

6-6-43 (Time: 1 hr., 5 min.) Instruction to Sam
Davis.

Quartzite, Arizona

6-7-43 (Time: 50 minutes) Instructed Dr. Salter 20
min.

Quartzite, Arizona

6-8-43 (Time: 1 hr., 20 min.) Parallel to a fade.

Quartzite, Arizona

(Plaintiff's Exhibit No. 3)

6-9-43 (Time: 1 hr., 30 min.) X.C. Instruction to
Dr. Salter.

Quartzite to Prescott, Arizona

6-10-43 (Time: 1 hr., 30 min.) Parallel on Ashfork.
Prescott, Arizona

6-10-43 (Time: 1 hr., 55 min.) Salter X.C. instruction.
Prescott to Quartzite, Arizona

6-11-43 (Time: 40 min.) " scraped L. Wing
on Bush.

Quartzite, Arizona

6-11-43 (Time: 46 min.) 1st flight for Lt. Parkharst.
Quartzite, Arizona

6-12-43 (Time: 1 hr., 45 min.) X.C. for Salter.
Quartzite to Pheonix, Arizona

6-12-43 (Time: 45 min.) Parallel to fade on *Phconix*
range.

Pheonix, Arizona

6-13-43 (Time: 2 hrs.) four passenger hops. In-
structed Roley.

Pheonix, Arizona

6-13-43 (Time: 1 hr., 47 min.) X.C. instruction to
Salter.

Pheonix to Quartzite, Arizona

6-17-43 (Time: 1 hr., 25 min.) X.C.—to Pete for check.
Quartzite to Pheonix, Arizona

6-18-43 (Time: 2 hrs.) Check Dave Franks. Ride B.
Roley.

Pheonix, Arizona

(Plaintiff's Exhibit No. 3)

6-19-43 (Time: 1 hr., 40 min.) Passed instr flight test
with inspector.

Pheonix, Arizona

6-20-43 (Time: 2 hrs., 5 min.) Ken Royce Bad Engine.
Pheonix to Quartzite, Arizona

6-28-43 (Time: 1 hr., 15 min.) Check flight Mira-
Loma, Oxnard, Calif.—Entered Instructor's
School Mira-Loma Flight Academy—

[Endorsed]: Case No. 3242. Cummings vs. Universal.
Pltf. Exhibit 3. Date: 1/7/44. No. 3 in Evidence.
Clerk, U. S. District Court, Sou. District of Calif.
Louis J. Somers, Deputy Clerk. [242]

Mr. Roth: There may be one other thing, that is,
in connection with this log, and that is that on the occa-
sions when he was not flying he was in Los Angeles
County.

Mr. Cooper: If that is to be considered testimony, I
would like to have an opportunity to cross examine him
on that.

Mr. Roth: Naturally you would.

The Court: Do you wish to recall the witness?

Mr. Roth: Yes. [315]

ROBERT CUMMINGS,

having been previously duly sworn, was recalled in rebuttal, and testified as follows:

Direct Examination

Q. By Mr. Roth: On the occasions, Mr. Cummings, when you were not actually flying, where did you reside?

A. When I wasn't actually flying, I stayed at my ranch in San Fernando Valley.

Q. Is that in Los Angeles County?

A. I think it is. It is Van Nuys.

Mr. Cooper: We will stipulate that that is in the County of Los Angeles. Yes, that is in the City of Los Angeles.

Q. By Mr. Roth: You have resided there continuously since about December 7, 1941?

A. Yes; that is my residence.

Q. And when you took these flying trips you came back to your place in Los Angeles: is that right?

A. Yes.

Mr. Roth: Cross examine.

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, referring to your log on May 19, 1943—

A. May I look at it?

Q. Yes, certainly. I notice you were flying and were in Quartzsite, Arizona, flying, on May 19, 1943, May 20, 1943, May 21, 1943, the 22nd, 23rd, 24th, 25th, 27th and 28th. [316] Do I understand you to mean that each night you returned to Los Angeles?

A. No; it isn't necessarily true that every night I returned to Los Angeles, no. Well, I had a little CAP truck, which is a truck from my ranch, that I had donated

(Testimony of Robert Cummings)

to the Civil Air Patrol for our use, and painted it with our colors, and I would drive that to Quartzsite; and I had a small tent, and I used to pitch the tent beside the truck, and I would stay in the tent at night on a cot, because there were no facilities in Quartzsite. And it was very hot on the desert, and I had to carry my own sleeping accommodations everywhere. And then when I would get ready to go into L. A., sometimes, if somebody was there to watch the tent for me and I was sure that they would, I would leave it, and take whatever valuables I had in the truck, and drive in to Los Angeles.

Q. How long would it take you to drive from Quartzsite to Los Angeles?

A. Approximately five and a half or six hours.

Q. I notice that you have made a particular entry on the night of May 28th that you returned to Los Angeles in CAP truck the same evening. A. Yes.

Q. Do you have some particular way of remembering that?

A. Yes; strangely enough I do have, because this man George Hyder, of whom I speak in the log here, was studying [317] flying down there, preparatory, I believe, to going into some aircraft work, but he was attempting to get a commercial license. I had seen him around the field, and several times he had driven me down to the restaurant where we had to eat in Quartzsite, and he told me that he was studying as hard as he could, but that he was having a little trouble with his navigation and meteorology, and asked me if I had had any experience in that, and I said yes, I did have. And he was staying in what was called the men's dormitory. And he got out his books and papers and started to explain to me

(Testimony of Robert Cummings)

how far he had gotten with his navigation and meteorology. And I said, "Well, George, don't you have a protractor?" And he said, "No, I don't. I tried to get one of those, and I understand they are very necessary." I said, "They are very necessary, because when you take your government test it is necessary to have one. I advise you very strenuously not to go ahead without this protractor." And he said, "I have a friend of mine in Los Angeles who was going to go down to Lietz, where they have navigational equipment, and buy me a protractor, but he hasn't sent it out yet." And I said, "I am going in to Los Angeles tonight, and I will get you a protractor." And he said, "Better telephone my friend and see if he has bought it, and then you won't have to buy a duplicate." So when I got the notes of my time, I had George Hyder's name, and by it was written the time he flew, within a week, and also the record of the plane, and also the [318] telephone number and the name of his friend, who I believe was an attorney—I can't remember now—and he said, "Will you call him," so I called the man, and he said, "Well, I had that protractor sent to George Hyder." And I said, "He hasn't received it and the poor guy is in an awful way. I don't think he is going to be able to pass this test if he doesn't have the proper equipment." And I said, "Shall I go down and get him one?" And he said, "No, I think what I will do is, I will go down and see about this one." And I said, "You will take that responsibility?" And he said, "Yes." And I know I had the thing in my mind, because he was worrying about whether he was going to pass the test or not.

(Testimony of Robert Cummings)

Q. Would you say, to the best of your recollection, that you, in all probability, did not return to Los Angeles between the 20th and the 21st?

A. That is of May?

Q. Yes. A. Fifth month, twentieth day?

Q. 5-21-43.

A. Yes. That I did not return between the 20th and the 21st?

Q. Between the 20th and the 21st.

A. I don't think I did. As a matter of fact, it is likely—on the 20th I was doing some instrument instruction with Ed Horton, and on the 21st also. Usually we flew very [319] early in the morning, because, on instrument instruction, the wind must be pretty good, and I think, since I flew with instruments the next day, it was likely I did not return to Los Angeles between the 20th and the 21st.

Q. Let us get back to the 19th. You were in Quartzsite, Arizona, flying every day, on the 19th, and on the 20th, and on the 21st, and on the 22nd, and the 23rd, and on the 24th and 25th, and then there is a day's lapse in there. A. Yes.

Q. Between the 25th and the 27th. Do you have some recollection as to whether you may have left Quartzsite on the night of the 25th? You do not appear to have flown on the 26th.

A. That is possible, that I did leave there. That doesn't stand out in my mind, whether I did or not. It is possible. The reason I think it is possible is because, being an instructor around a field like that, where people are so avid for instruction, due to the pressing need for flyers, you have got to instruct them. About the only reason I could possibly think of that I didn't fly that day

(Testimony of Robert Cummings)

would be, it seems to me there was a—yes, I do know why we didn't fly that day. There was a forced landing on 5-24-43. The propeller broke on the instrument instruction ship, and I made a forced landing at Herron Field, which is at Blythe, and I think the next day, instead of coming back to the field, we went to Herron and worked all day getting [320] the prop back on that ship, because it put the ship out of commission.

Q. Let me ask you this question, then: Then, to the best of your recollection, you were at Quartzsite continuously from the 19th to the 25th, and then probably on the 26th you were in Herron?

A. Yes. That is very near Blythe.

Q. Just over the border? A. Yes, 27 miles.

Q. Well, to make sure that you didn't return to Los Angeles until the afternoon of the 28th—

A. That is correct.

Q. I notice on April 11, 1943—

A. Yes.

Q. You were in Las Vegas some four hours and seventeen minutes.

A. Wait a moment. Is that on April 11th? Does it say there Las Vegas?

Q. It says so on this.

A. That may be a mistake. 4-11—no; that is a mistake; that is definitely a mistake.

Q. That should be Quartzsite?

A. It should be Quartzsite, because I have a reason to know that I was at Quartzsite that day.

The Court: Do I understand that the transcript is in error? [321]

A. There is an error there, yes.

(Testimony of Robert Cummings)

Mr. Cooper: That is on April 11, 1943, page 4, between lines 6 and 7.

Mr. Roth: What place?

Mr. Cooper: Quartzsite.

The Witness: It was Quartzsite instead of Las Vegas.

The Court: Well, I will make the correction accordingly on the exhibit.

Mr. Roth: It is Quartzsite, under the date and the name of the city?

Mr. Cooper: I notice on that—

The Court: Just a moment. Let us see if we get this correct. Counsel calls attention to the fact that the designation of the locality follows.

Mr. Cooper: Oh, I see.

The Court: The date, in other words, relates to the date immediately preceding. Then we had better not disturb this.

The Witness: Oh, it is correct, then. I didn't realize it.

Mr. Roth: May it please the court, I helped the secretary prepare this, but she inadvertently left out the names of the places that your Honor specifically wanted. You will observe, then, that we went back and had her insert the names of the cities after the instrument was prepared, and wherever it gives a date, such as on the first page, line 15, between lines 15 and 16, where it says "9-13-42," we inserted [322] where Mr. Cummings happened to be at that time, so we therefore inserted "Boulder City to Las Vegas." and all through the entire instrument we had to get it out in that way.

The Witness: I was at Quartzsite on 4-11-43.

(Testimony of Robert Cummings)

Q. I notice on that day you said, "4 hours, 17 minutes, C.A.P. training of members," and then on the same date it says, "Time: 42 minutes," and on the same date, "Time: 35 minutes. Airport registrar Jennie Delaney."

A. Yes.

Q. And also on April 11th, "Time: 20 minutes, C.A.P. training." A. Yes.

Q. I take it that you returned to Los Angeles following this last item?

A. You mean the twenty minutes flying on the 11th?

Q. That is right.

A. Yes, I did return to Los Angeles that night.

Q. Did you drive back? A. Yes.

Q. And do you know what time you left on the 10th of April? A. We left on the 10th?

Q. I don't know where you were on the 10th.

A. You mean in order to get to—

Q. In order to get to Las Vegas. [323]

A. Well, now—

The Court: Why do you refer to Las Vegas again?

Mr. Cooper: It is my mistake again. I mean Quartzsite.

A. Being the squadron commander of a squadron of flyers, we had to plan somehow to get all the people who were capable of flying aircraft to a field at which we could give them instruction in a group, and get them back. The reason we had to get them back was because most of them were workers at Lockheed and various places, so we tried to plan the trip so that it would fall on a Sunday. There were times when we went up on a Saturday, if some of us could get off, if I could get off, and in that way they could fly over Sunday and be back

(Testimony of Robert Cummings)

Sunday night, permitting them to get to work Monday morning.

Q. What I am getting at is this. Did you refresh your recollection as to approximately what time you left on Saturday, if you were in Los Angeles?

A. What time I left Los Angeles Saturday night?

Q. Yes.

A. Well, I can't say truthfully that I remember the exact time. There were times when I knew I came back pretty tired from those trips, and there were times when I couldn't leave Los Angeles until 10:00 or 11:00 o'clock at night, and I would drive with one of the members of the squadron, and I would get there, and they would have a tent pitched for me and take care of me, because I was the only instructor they [324] had, and in the morning they would take me up, and I would get out on the flying line, and the executive officer would have all the planes lined up, and I would start to fly.

Mr. Cooper: That is all.

Redirect Examination

Q. By Mr. Roth: During all the time you were in Quartzsite and other places, were you in constant telephone communication with Oscar?

A. Not constantly.

Q. How often would you telephone him?

A. Sometimes we would talk, might talk, twice a day, or might not talk for two days or three days sometimes, but he knew where I was, and it was just a question if I had anything to talk about, and I wouldn't call if I had nothing to call him about, I wouldn't call.

Mr. Roth: That is all.

The Court: We will have a five-minute recess.

(Short recess.)

Mr. Roth: If your Honor please, normally plaintiff opens and closes in a case, but in this particular matter all of the facts in the complaint have been stipulated except two. One is the nature of the demand which was made on April 10th, and the other is whether any demands or requests were made upon the plaintiff between the dates of April 10th and June 3, 1943, by the defendant. Both of those have been established without contradiction by the evidence, that is, [325] as far as the nature of the demand is concerned. There will be a dispute as to whether or not the telegrams ever arrived. As far as any demands having been made between the 10th of April, 1943, and June 3, 1943, or May 29, 1943, are concerned, there is no contradiction in the evidence. So there are no facts to argue on our phase of the case. There are merely questions of law, which the court will have to decide, and which have been adequately briefed.

The controversy with respect to the facts is on the affirmative defense of estoppel. I think the burden of establishing that defense is, of course, on the defendant, and if, by chance, that is not the case, as far as the defense of estoppel is concerned, if the burden is on us, we waive the opening argument. If it is properly upon the defendant, we will take our proper place.

The Court: May I inquire as to what the plaintiff's position is respecting that portion of the evidence which has to do with the sending of the telegrams bearing date April 10, 1943. I am not speaking as to the legal effect at this moment, though, but what his position is respecting what happened with reference to the delivery of those telegrams; in other words, the bringing home to plaintiff of the contents thereof or the substance of their contents; and also that phase of the evidence which has to do with

ascertaining the true meaning and purpose of the defendant in sending those telegrams. [326]

Mr. Roth: On the question of the telegram itself, that is, the telegram of April 10th, apparently, under the law, presumptive delivery is established by delivery to the telegraph office. Under the law, too, that is a disputable presumption. The uncontradicted facts in the case show this: That on April 12th the Western Union itself sent, via teletype, a wire to defendant, and in that wire Western Union specifically set up the nature of the delivery, and it said in so many words that the telegram was not personally delivered either to Oscar Cummins or to Robert Cummings, but went on to say—I am not quoting it literally—that it was telephoned to various addresses, with no response, that there was no one there, and that they finally reached or phoned Mrs. Oscar Cummins, at a specific address. That is what the telegram of Western Union to the defendant says. Then we put Mrs. Oscar Cummins on the stand, and she testified—and her evidence is uncontradicted—that she never received any such message either on April 10th, April 11th or April 12th. So that is the condition of the record, on the question of that wire, in respect to the court's first question. On the second question—

The Court: Let me interrupt there again. Then I take it your position, in brief, is, on the matter of the delivery of the telegrams or bringing home to the plaintiff the contents thereof, that the presumption which the law creates has been clearly overcome by the very records of the Western [327] Union Telegraph Company?

Mr. Roth: Plus one other thing, your Honor, which I mentioned. That is the testimony of Mrs. Oscar Cummins. And plus something which I didn't mention, which I men-

tion now, and that is the uncontradicted testimony of the witnesses Kelley, Muhl, Ward and Speers, that after the wire of April 10th was sent nothing further was done to notify either Robert Cummings or Oscar Cummins. On the second question that the court asked, as to what was in the mind—

The Court: As to what we may fairly construe to be the real purpose of that telegram.

Mr. Roth: That, of course, is arguable from the facts, if we desire to go into the facts. At this time, because of evidence which is in the record, certain things can be argued as to what was in the defendant's mind. Irrespective of what is in the record, plaintiff is satisfied to rest, as far as this argument is concerned, on the telegram itself, and on the notices which followed it, if the subject is opened up. I merely say that because, if it is argued by the defense, there are certain matters which I will argue from the facts in respect of the meaning of that wire of April 10th, based, of course, upon the testimony of the witnesses of the defendant itself and certain inherent probabilities in the case. But for present purposes we are content, as far as our case is concerned, severed from the separate and affirmative defense, to stand upon the admitted or stipulated facts and the [328] uncontradicted facts in the record.

Mr. Cooper: May it please the court, I am perfectly happy and prepared to argue the matter at this time, but I think—and, of course, I realize that it is addressed to the sound discretion of the court—that there should be a fair opening.

The Court: Let me interrupt to make this observation: Under any hypothesis, you would have the closing argument, in the light of what has just been stated.

Mr. Cooper: That would be satisfactory, then, may it please the court.

The Court: So that I think you might now proceed.

Mr. Roth: I omitted, in my resume of what were the uncontradicted facts, to also state that Oscar Cummins, in addition, testified that he had never received this wire of April 10, 1943, or been informed about it. [329]

(Oral argument by Mr. Cooper, in the course of which the following proceedings took place):

Mr. Cooper: I must take the position, first, that if your Honor finds as a fact—and I recognize that your Honor can find the other way if your Honor believes Oscar Cummins—that the telegram of April 10th was in fact served—and I am assuming that your Honor concludes that the telegram was served—I realize that this point is made in the brief, but, with your Honor's permission, I should like to refer to it again.

The Court: Let me interrupt to see if I grasp fully the import of the statement just made. Are we agreed that the evidence, so far as the Western Union Telegraph Company is concerned, is to the effect that the telegram of April 10, 1943, was delivered orally over the telephone?

Mr. Cooper: I make no contention, if your Honor please, that the evidence shows that Western Union says that it was delivered personally to Oscar Cummins or Robert Cummings; I make no such contention. It is my contention that the testimony offered by Lester Roth on behalf of the plaintiff with respect to what actually happened does not destroy the presumption.

The Court: Perhaps I didn't make myself clear. All I want to make certain is whether it is your position that the evidence is to the effect that the telegram was delivered orally over the telephone by Western Union. [330]

Mr. Cooper: The evidence is to this effect, that Western Union orally phoned the telegram to Mrs. Oscar Cummins; and, secondly, that they orally telephoned the message to his sister-in-law; and, thirdly, that they tried to deliver it to Robert Cummings, and he was reported to be out of the city. That is as far as the evidence shows. But, may it please the court, it is my position that that fact still does not destroy the presumption. In other words, the presumption is that if the telegram is in fact delivered to the Western Union, that it goes all the way through and gets to the person to whom it is addressed. May I read that, or does your Honor quarrel with that statement?

The Court: No, I am not quarrelling on the subject matter of the legal principles. I am trying to find out what your position is as to this probitive fact. It isn't yet clear to me as to what your position is. Having in mind this presumption, is it your contention that the evidence satisfactorily establishes this probitive fact, namely, that the telegram of April 10, 1943, was delivered over the telephone to Mrs. Oscar Cummins some time on Sunday, April 11, 1943? Do you go that far?

Mr. Cooper: There isn't any question about it, if your Honor please. That is what the testimony offered by the plaintiff shows, that it was phoned to Mrs. Oscar Cummins.

The Court: On April 11th?

Mr. Cooper: On April 11th, or whatever date it was. I [331] think it was the 11th, if your Honor please.

The Court: And as to the delivery of the same telegram over the telephone to someone referred to as—

Mr. Cooper: His sister-in-law, if your Honor please.

The Court: The sister-in-law of Oscar Cummins?

Mr. Cooper: Yes, to his sister-in-law.

The Court: Upon what date?

Mr. Cooper: It was phoned to his sister-in-law at 10:50 a. m., 11th, who will relay message to him.

The Court: Will you just pass that up temporarily?

Mr. Cooper: Yes, your Honor.

The Court: Very well.

Mr. Cooper: Now, I don't want to spend too much time on that point if I have made my position clear.

The Court: Yes, it is.

Mr. Cooper: In other words, as it stands at the present moment, it is our view that there is a conflict in the evidence, and your Honor can find either way. I am taking the position that your Honor finds that this telegram was in fact delivered. In that event there isn't any question but that knowledge was brought home to the plaintiff that he was required to report at the studio.

The Court: Right there, let us assume, for the purpose of this discussion, that on April 11th Western Union did deliver the telegram of April 10th over the telephone, both to Mrs. Oscar Cummins and to a sister-in-law of Mr. Oscar [332] Cummins, each of whom promised to relay the message to Mr. Oscar Cummins. Unless the message was received either by Mr. Robert Cummings or by his representative, Mr. Oscar Cummins, in time to enable the plaintiff to report at the studio by April 12th, would you say that the evidence is sufficient to warrant a

finding to the effect that the defendant gave notice to the plaintiff in time to enable him to comply therewith?

Mr. Cooper: Yes, your Honor. I have, I think, an absolute answer to that in paragraph 15 of the contract:

"If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

That is what the parties contracted. On first reading. I thought they said that mere delivery to the telegraph company should be deemed service, although they didn't go that far. That is paragraph 15, and that is set forth in the brief on page 30 of our memorandum of points and authorities, our trial brief.

Mr. Roth: I would like to interrupt at this time to make my position clear on this wire as I intend to argue it. When I read the telegram, I took it for granted—and I think there is enough in the telegram to warrant it—that the sister-in-law of Robert Cummings and Mrs. Oscar Cummins [333] are one and the same person. I realize that the request is somewhat tardy, but I presume the court and counsel want the facts, and it just so happens that Robert Cummings is an only child and has no sister-in-law. There is no sister-in-law of Robert Cummings. He testified directly, under examination by Mr. Cooper, that he never received this wire and was never told about the wire. So far as the wire is concerned, we can supply the information in a moment. But the telegram is definitely subject to this interpretation, that is, that Mrs. Oscar Cummins and the sister-in-law are one and the same person, and they say "We phoned to Mrs. Oscar

Cummins," and they refer to the address of Robert Cummings as 14111 Sherman Way, Van Nuys. That is not the address of Oscar Cummins. I am just calling that to the court's attention at this time.

Mr. Cooper: If the court please, if counsel has some motion to make—

Mr. Roth: I can argue that from the telegram. But I would like the court to give me permission to reopen for the purpose of putting on that one fact. But I think the telegram definitely bears that construction in its present form.

The Court: Evidence to what effect?

Mr. Roth: Evidence to the effect that the only person that Western Union claims they phoned this message to was Mrs. Oscar Cummins, and that when they say sister-in-law and [334] mention Mrs. Oscar Cummins they mean one and the same person, to show that they didn't phone it to two separate people. That is all I say the wire says. That is the only reason Mrs. Oscar Cummins was put on the witness stand. And I figured that it had been sufficiently covered when Oscar Cummins and Robert Cummings both testified that they never saw the wire of April 10th and that it was never transmitted to them in any form.

Mr. Cooper: Well, counsel, you are handling the plaintiff's case—whatever you suggest doing.

Mr. Roth: I think it is a matter that is important to the court.

The Court: Yes, it is.

Mr. Roth: When I read the wire I thought I was justified, in putting in my case, in reaching the conclusion

that it meant one and the same person, because, knowing the facts as I did, I couldn't conceive of it meaning anyone else.

Mr. Cooper: I can tell you that I thought it was his sister-in-law and his wife, because I went to the trouble of looking up those facts last night.

Mr. Roth: They do not name the sister-in-law or give the address where they phoned her. I suggest at this time that Robert Cummings be recalled to testify to the one fact as to whether or not he has a sister-in-law.

Mr. Cooper: I haven't any objection to that.

The Court: Let me ask you this question: Is it your [335] position, Mr. Cooper, that the plaintiff's sister-in-law mentioned in Plaintiff's Exhibit I purports to refer to the sister-in-law of the plaintiff?

Mr. Cooper: I took it to refer to the sister-in-law of Oscar Cummins. It could mean either. Here is what it says: "Your telegram to Robert Cummings care Oscar Cummins, 527 California Bank Building, out of city, address unknown, was phoned to his sister-in-law at 10:50 A. M., 11th, who will relay message to him." It could mean Robert Cummings' sister-in-law or Oscar Cummins' sister-in-law. It is ambiguous, as it is called to my attention.

Mr. Roth: But each one was a separate address. There was one to Robert Cummings at the Van Nuys address, and one to Oscar Cummins, at the California Bank Building, addressed to Beverly Hills, and there was one to Oscar Cummins at an address on Sunset Boulevard, so those were the only three places that could have been phoned. What I intended to argue from this wire in its present form was that, in view of Mrs. Cummins' testi-

mony, the best construction that could be given to it was that someone in the house, in Mrs. Cummins' absence, probably told the Western Union that they would advise Mrs. Cummins when she returned home.

The Court: In any event, since there is an ambiguity, which is created by the wording which Western Union itself used, I think they should first be called upon to make clear—and I presume they can, from their records—what they [336] mean by the use of the expression “sister-in-law,” because, if it is not referred to one individual, there is no use having evidence with reference to another individual.

Mr. Cooper: As a matter of fact, if your Honor please, I had the representative of the Western Union get the girl who actually phoned the message, but I didn't feel that it was necessary, in view of the fact that counsel didn't cross examine the gentleman from Western Union when he was here.

Mr. Roth: I should have thought, Mr. Cooper, that after the evidence in rebuttal here from Oscar Cummins and then Mrs. Oscar Cummins and Robert Cummings, that it might have been necessary for you to call her.

Mr. Cooper: Not in view of the fact that you referred to, that is, that this was phoned to Mrs. Oscar Cummins. I haven't talked to her.

The Court: Well, let us see if we can make some progress here. In the first place, you might, after conference with plaintiff's counsel, determine whether you are prepared to stipulate that, if plaintiff was recalled to the stand, he would testify that he has no sister-in-law.

Mr. Cooper: If he says that is the fact, I will stipulate that he will so testify.

Mr. Roth: Is that true? Do you have any sisters or brothers?

The Plaintiff: No.

Mr. Roth: Does your wife have a sister? [337]

The Plaintiff: I have no wife.

Mr. Roth: You did have a wife?

The Plaintiff: I did have a wife, but she was an only child.

Mr. Cooper: I will offer to stipulate that he will so testify. I mean that I will accept that stipulation. I would like to call Oscar Cummins about this point.

Mr. Roth: He already testified on this point.

Mr. Cooper: About whether he has a sister-in-law. In other words, it is a fact that Oscar Cummins does have a sister-in-law; is that right?

Mr. Roth: That is right.

Mr. Cooper: Then do you offer that in the form of a stipulation?

Mr. Roth: No, not unless you will offer to stipulate that she didn't receive the phone call.

Mr. Cooper: No; that I wouldn't stipulate to. The only thing is, I would like to call Oscar Cummins for just that point.

The Court: Yes. The ruling is that, by virtue of the stipulation just made, the record now discloses that the plaintiff is deemed to have testified that he has no sister-in-law and did not have any sister-in-law in the month of April, 1943.

Mr. Cooper: That is fair enough. [338]

OSCAR CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff,
upon being recalled as a witness in behalf of defendants,
testified as follows:

Direct Examination.

Q. By Mr. Cooper: Do you have a sister-in-law?

A. Yes.

Q. More than one?

A. One in California and one in Detroit.

Q. One in Los Angeles? A. Yes.

Q. In Beverly Hills? A. In Los Angeles.

Mr. Cooper: That is all.

The Court: May I ask, on April 10th and 11th of 1943, referring now to the sister-in-law residing in Los Angeles, where did she reside?

A. 5000 Finley Avenue.

The Court: Subject, of course, to a direct check by counsel, in the month of April, 1943, did your sister-in-law residing at the address just stated, have either her name or her husband's name listed in the Los Angeles Telephone Directory?

A. I think it is an unlisted telephone.

The Court: When you speak of the sister-in-law residing in Los Angeles, are you referring to the wife of your brother [339] Joe? A. Yes, sir.

The Court: I have no other questions.

(Testimony of Oscar Cummins)

Cross-Examination.

Q. By Mr. Roth: Did Mrs. Joseph Cummins, as far as you know, live in Los Angeles at the address you gave?

A. Yes.

Q. Did she, in the month of April, at any time during the month of April, 1943, advise you that she had received a message from the Western Union Telegraph Company for you or for Robert Cummings? A. No.

Mr. Roth: That is all.

Mr. Cooper: No further questions.

Mr. Roth: Mr. Joseph Cummins can testify, unless you want to stipulate to it, that his name was not in the telephone book, and that he had an unlisted number.

Mr. Cooper: If you say that is a fact, I will stipulate that he will so testify.

Mr. Roth: That is a fact.

Mr. Cooper: I accept the stipulation that he would so testify.

The Court: Then that stipulation can be deemed to be a part of the record.

(Further argument by Mr. Cooper.) [340]

(Argument by Mr. Roth.)

The Court: We will continue this matter to Monday at 2:00 p. m.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., Monday, January 10, 1944, the time later being changed to 10:00 o'clock a. m. of the same day.)

[341]

Los Angeles, California, Monday, January 10, 1944;
10 A. M.

(Parties present as before.)

The Court: Now are you ready to proceed?

Mr. Cooper: Yes, your Honor. Pursuant to your Honor's suggestion, I have here this morning Mr. Meaney, from the Western Union Telegraph Company, with all of those records in connection with the sending and phoning of the message in question. In addition thereto, we have a gentleman by the name of G. B. James, an employee of Western Union, who, I am informed, made one of the phone calls, and a young lady by the name of Bernice Yorton, who phoned in one or two of the calls in question. Does the court desire to make his own inquiries, or does the court desire that I proceed?

The Court: My present view is that I would like to see the original records themselves; and, after scanning the same, determine whether it will be necessary to interrogate anyone.

Mr. Cooper: Very well. But I have them here, out of an abundance of caution, if your Honor please.

The Court: Yes.

Mr. Cooper: Mr. Meaney, will you please come forwards? [342]

J. E. MEANEY,

a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

The Court: You have already been sworn in this case. I understand you have produced the records of the Western Union Telegraph Company, taken from the Los Angeles office? A. I have.

The Court: Records which relate to what your company did with reference to telephoning the telegram bearing date April 10, 1943, from Universal Pictures Company, Inc. to Robert Cummings? A. I have.

The Court: Now, would you let me see them, and perhaps we may need a particular paper only, without disclosing its contents, merely describing the nature of the records as they pertain to the office of the Western Union Telegraph Company.

Mr. Roth: And might I also request that, after the court has scrutinized the data, I might also look at it.

The Court: It might be preferable if counsel will look at it first. That may save me a little labor.

Mr. Roth: Just as your Honor desires.

The Court: Suppose counsel step alongside the witness bench and peruse the record.

Cross-Examination.

Q. By Mr. Roth: You have handed me, Mr. Meaney, three papers, which purport to be original wires from Universal [343] Pictures Company, Inc., by Edward Muhl, Assitant Secretary, one addressed to Robert Cummings, care Oscar Cummins, 8511 Sunset Boulevard; another addressed to Robert Cummings, by the same corporation, signed by the same assistant secretary, the address being

(Testimony of J. E. Meaney)

14111 Sherman Way, Van Nuys, California. Is that correct?

A. Well, these are not the originals. The originals were submitted to the court last week. These are delivered copies. The original telegrams I submitted last week.

Q. When you speak of delivered copies, you don't mean physically delivered copies, do you?

A. No, not in this case.

Q. And the third one is signed the same way, and is addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building?

A. Yes.

Q. All of the wires which you have shown to me have at the top the figures—the first one has "S 114 90 4." Does that number have any significance?

A. Yes. That is the wire number of the telegram. The "90" means the number of words, and the "4" the extra words, on the check.

Q. And "BV" is what?

A. "BV" is the office call of the Western Union office at Beverly Hills, California. The office has a distinctive office call. "BV" is Beverly Hills. [344]

Q. And then the words "Beverly Hills, Calif" and then the—

A. That is the date. And "617P" is the filing time.

Q. This means that it was filed at your office at 6:17 p. m.?

A. Yes.

Q. And the second wire has the same filing time?

A. "6:07 p. m."

Q. And the words—the "10" is what?

A. The date, April 10th.

Q. And the third one?

A. That is 6:11 p. m., on the same date.

(Testimony of J. E. Meaney)

Q. Now, from those three documents which I have shown you, and from the words and figures which have been read, and which you have interpreted, can you tell whether those documents were physically delivered at the Beverly Hills office, or whether or not they were transmitted by telephone to the Beverly Hills office, or by teletype service?

A. They were physically delivered to the Beverly Hills office.

Q. What is there on the documents to show that?

A. As I say, the originals are already in. These are the wire copies.

Q. What is there on the originals—

Mr. Cooper: We have now before us Defendant's Exhibit B.

Mr. Roth: That is correct. [345]

Q. What is there on the originals to indicate that they were physically delivered?

A. That is a typewritten copy, and if that was taken over the printer from Universal, it would be a different appearing copy of the message. This is typewritten, where ours would be similar to this, a taped copy or a teletype copy.

Q. When you speak of "printer" you mean teletype?

A. That is right.

Q. Is there anything else which indicates to you, from the original, that is, Defendant's Exhibit B, that it was physically delivered?

A. Well, I would say, without any question, from my experience in handling telegrams, that it was physically delivered to the Beverly Hills office.

(Testimony of J. E. Meaney)

Q. Do you have any other reason for saying that other than the fact that Defendant's Exhibit B shows that they were typed, and not taped in?

A. Yes. They are absolutely not taped in.

Q. Do you have any other reason for saying that they were physically delivered other than that reason?

A. Well, they were found in our files at the time the subpoena was served on us, and if they were teletyped in we wouldn't have this copy in our file; we would have a taped copy.

The Court: When you say "this copy," you mean Defendant's [346] Exhibit B? A. Yes.

Q. By Mr. Roth: Defendant's Exhibit B?

A. Yes.

Mr. Roth: We have examined these three wires which have been identified by the witness, your Honor, and I will pass them up to you, while we look at some other data.

The Court: Which documents were you examining, Mr. Meaney, when you determined the hour, or the hour and minute when the telegrams were physically left in the Beverly Hills office?

A. The ones I just testified about as to the filing time, was on the copies here, the taped copies.

Q. By Mr. Roth: The copies other than Defendant's Exhibit B?

A. That is right. Right after the date you will find the filing time, after the "10."

Mr. Roth: May I suggest that the examination of the balance of the data be off the record, because it is in the nature, I think, of a preliminary examination, to determine whether or not the court is going to see this, and it is for

(Testimony of J. E. Meaney)

the purpose of giving counsel an opportunity to see what is in this data. I haven't the slightest idea.

The Court: Is that agreeable to both sides?

Mr. Cooper: It is perfectly agreeable, your Honor.

The Court: Very well. The part that is now inquired into need not be taken down in shorthand, Mr. Reporter.
[347]

(Off the record examination by Mr. Roth.)

Mr. Roth: I have another suggestion. We are going over this informally, and if the court will instruct the reporter to take it down we may be willing to stipulate, after we get through, that it may be considered part of the record.

The Court: Suppose you try and epitomize what has been said thus far.

Mr. Roth: I will try, and then we may not have to go over it.

Q. By Mr. Roth: Mr. Meaney, I understand that in answer to my questions you have stated thus far that this wire, which I will identify as having been sent by Universal Pictures Company, Inc., Edward Muhl, secretary, to Robert Cummings, at 14111 Sherman Way, Van Nuys, California, and which bears in the upper lefthand corner the letter and figures "S 114 90," has at the bottom thereof, in pencil writing, these words or letters and figures: "BA." A. "858 A."

Q. And under "DA" we have "858 A"?

A. That is right.

Q. And to the right we have the letters and figures "SU 22636," and opposite that, to the right thereof, "Adv"? A. "Adse."

Q. "Secy"? A. Yes.

(Testimony of J. E. Meaney)

Q. And to the right of that the figures "11"; is that [348] right?

A. No. That "11" should come after the—

Q. But it doesn't. I am placing it where it is on the telegram. A. Yes.

Q. The figures "11" come after that? A. Yes.

Q. In other words, it is "11th"? A. Yes.

Q. Under the number "SU 22636" there is the capital letter "B"? A. That is right.

Q. And also under the number we have the figures "10" and the letter "A" after that? A. Yes.

Q. And to the right of that what are those letters?

A. "Dlv," delivered.

Mr. Cooper: The "11" is more or less to the right of both of those matters, that is, to the right of "SU 22636," and "Adse Secy." and "B 10 A."

The Witness: "Dlv."

Q. By Mr. Roth: Does that mean that those words and figures and letters mean that the man "B" phoned that telephone number and delivered the message to Robert Cummings' secretary. A. That is right. [349]

The Court: On April 11, 1943?

A. On April 11, 1943.

The Court: At what hour? A. At 10 a. m.

Q. By Mr. Roth: Under the handwritten letters and figures which I have read there is also a name, "Oscar Cummins," written in hand, and under that "Br 04065." Does that have any significance?

A. I know that that is in a different handwriting, by probably another girl, and they secured some information some place that Oscar Cummins, that they may be able to phone this to Oscar Cummins at Bradshaw 04065.

(Testimony of J. E. Meaney)

Q. Can you identify either handwriting, the handwriting I read first, or the one that wrote "Oscar Cummins"?

A. So far I can't. I don't know this gentleman's handwriting, other than to know that he is operator James at our Van Nuys office. I would not be able to say that is his handwriting, because I don't know.

Q. You couldn't say that either are in the handwriting of operator James? A. No.

Q. Can you tell from the handwriting which has been read to you whether operator James actually called Robert Cummings' secretary?

A. It is hearsay, which is as he told me after talking to him about this case. [350]

Mr. Cooper: Operator James is in the courtroom.

The Witness: Yes.

Q. By Mr. Roth: In the upper righthand corner of this same wire which I have, I think we have in handwriting "fone Cr 68798," and under that "607 N. Elm Dr., Beverly Hills"? A. That is right.

Q. Do you know whose handwriting that is in?

A. No, I couldn't say.

Q. What does that mean on the wire?

A. Well, you want my theory on it?

Q. Did it have a meaning?

A. It certainly did. This 607 North Elm Drive would indicate that they had some information that night that this party could be found at phone Crestview 68798, and they forwarded by wire this message; they resent this message back, to be tried at that phone number and that address.

(Testimony of J. E. Meaney)

Q. When you say "they," you mean the Van Nuys office sent it back to the Beverly Hills office to be phoned to the Elm Drive address?

A. Yes. But the message still was in the Van Nuys office, to be tried for subsequent delivery.

Q. Now, as part of the file on this wire, which has already been identified, you have another—it is not a wire, but it may be an interoffice communication.

A. It is a service message. [351]

Q. That is dated April 11th, then AM 8:12?

A. Yes.

Mr. Cooper: That looks like a stamp.

A. That is right. That is an electric stamp.

Q. By Mr. Roth: That reads: "Relay Robert Cummings Phone Crestview 67898 607 North Elm Beverly Hills Unkn." That means unknown?

A. That is right.

Q. And it is also signed "Dly Los A"?

A. That is delivery department, Los Angeles.

Q. They wired back to Van Nuys that the addressee could not be found at North Elm Drive?

A. That is right.

Q. And at the bottom of that there is this notation: "10 Relay Robt Cummings try Phone Br 04065 Care Oscar Cummings DFS Direct if DLD Van Nuys Calif Apr 10." A. April 11th.

Q. What is the other?

Mr. Cooper: The "10" is marked out.

A. That is one of our errors.

Q. I hope you don't include me in that.

A. I hope not.

(Testimony of J. E. Meaney)

Q. What does that mean?

A. This means that this was prepared at 10:15 on the morning of April 11th, that is, this latter one you referred to, by a different clerk, AEW. This notation here, this [352] "Oscar Cummins Bradshaw 04065," that this employee received information that—

Q. That he might reach Robert Cummings there?

A. Yes.

Q. So they tried that Bradshaw number?

A. That is right.

Q. That number is "Br." Could it have been "Brighton" instead of "Bradshaw"? A. No.

Q. What would you put down for "Brighton," instead of "Br."?

A. I think they would write out "Brighton," because I don't know of any exchange—if there are two, we always write the second one.

Q. For your information, Mr. Meaney, there is an exchange that is designated "Brighton."

A. We would write that out.

Q. Why do you say you would write out "Brighton"? Why wouldn't you be writing out "Bradshaw"?

A. When we telephone messages to a Sycamore number, we use "Sy." but if it is "Sylvan," it is written "Sylvan."

Q. Also attached as part of the file I have identified, you have what apparently is another inter-office communication. Am I right? At least, I am taking it from the papers you have given me.

A. That is what they are, you bet. [353]

Q. This inter-office communication also has the stamped date April 11 AM 10:34. A. Yes.

(Testimony of J. E. Meaney)

Q. And it says: "617 10 Robert Cummings SGD Univ Pictures CO OC Ads Unkn Van Nuys Calif." Will you decipher those hieroglyphics?

A. That means that Robert Cummings was out of the city. "OC" means "out of city," and "Ads Unkn" means "address unknown."

Q. Now, I have noticed that this was filed at 10:34 A. M. Is that right? A. Yes.

Q. That is shown on the wire itself.

A. This wasn't filed at 10:34. That is when it was received at the main office.

Q. That is what I meant to say.

A. That is right.

Q. How do you reconcile that inter-office communication which has just been read with the message in handwriting at the bottom of the original wire, which says it was delivered to Oscar Cummins' secretary at 10:00 o'clock A. M.?

A. I would have to confess some delay in our office for that. We have a lot of new employees. This was phoned by a different employee, who didn't follow the job through by sending a Dfs on it, if it was phoned or otherwise. This service message wouldn't have been sent if there had been [354] coordination between the service clerk and the operator; that wasn't present.

Q. Wouldn't that indicate also that the service clerk phoned Robert Cummings at the Van Nuys address, and was told that he was out of the city? A. No.

(Testimony of J. E. Meaney)

Q. Would it indicate that the service clerk made some inquiry and found out that Robert Cummings was out of the city?

A. Well, they did. He was basing this on something that he had known, but in the interim—

Q. It comes after this message is supposed to have been phoned to Robert Cummings' secretary. How do you explain that?

A. It is quite possibly for the reason, as I have explained, that there was a lack of coordination there, the message being phoned, and still we serviced at that time.

Q. At the bottom of this inter-office communication, which shows Robert Cummings was out of the city, there are the letters "Su" and the figures "22171"—Sunset?

A. Yes. Well, "22171" or "22131." That would be a guess on that last.

Q. Yes; it could be a "3" instead of a "7."

A. You know when the paper gets shifted.

Q. When no one is holding it and you are writing, it slips? [355]

A. Yes.

Q. Does that telephone number have any significance?

A. Well, not to me, unless just some idea where they can deliver the telegram. Just as an explanation, when we have telegrams like this our employees are urged to use great care, by indicating with two stars on it, because we know the messages are of very great importance, and they use every effort to deliver them, and get every little clue.

Q. Could this mean that the service clerk, whoever it was who sent this message, that that service clerk telephoned that number and got the information which is in the wire?

A. Well, it could mean—

(Testimony of J. E. Meaney)

Q. Could it mean that?

A. Well, I wouldn't even—it is a number, and that is all it means. I don't know what the person was thinking of.

Q. Do you know what they were thinking of when they wrote the number on the original wire?

A. Yes, because that is our regular, general routine.

Q. We will proceed with the next document, which is part of this file. That is also an inter-office communication?

A. I think you will find this is a carbon copy.

Q. It is not a carbon copy.

A. That is what we call a runner. That is an office record, with a description of the telegram, and is put in the file, and later, if Mr. Cummings came home and someone said, [356] "Western Union is looking for you; they have a telegram for you," they call us and we look through our undelivered messages and dig this out.

Q. Well, that is on one side of a printed form, which has at the top thereof the Western Union Telegraph Company memoranda of the handling of undelivered messages? A. That is right.

Q. This memorandum of undelivered message, is it left at the address of the addressee? A. No.

Q. That is kept in the files of the Western Union?

A. That is right.

Q. It has on the printed side thereof, after the printed word "Addressee," the name "Robert Cummings," and the message number, after the printed word "message number," "S114"? A. That is right.

Q. And after the printed word "Dated," it has "4/10"? A. That is right.

(Testimony of J. E. Meaney)

Q. In the line which has this printing, "Notify originating office by service message," it has the initials "EW." What does all that mean?

A. This "EW" is the clerk in the Van Nuys office, and she wrote in there indicating that she sent a service message notifying "undelivered."

Q. She sent a service message to your office?

A. To the main office. [357]

Q. Advising them of non-delivery?

A. She sent this to the Beverly Hills—

Q. Advising non-delivery?

A. That is right.

Q. And that all went in on this file?

A. That is right.

Q. And this went in—could you tell at what time?

A. 10:10 a. m.

Q. I call your attention again, Mr. Meaney, to the fact that at the bottom of the original wire which we have identified by the number "S 114 90," the letters and figures in handwriting you say indicate a delivery by telephone at 10:00 o'clock a. m. to the secretary of Robert Cummings?

A. Yes.

Q. How do you reconcile those two?

A. It is probably delay, as I said before, lack of coordination between the service desk and the operating desk. It was reported undelivered ten minutes after it was delivered. That is delivered, based on the information here.

Mr. Roth: Mr. Cooper, may we staple these together?

Mr. Cooper: No objection.

Mr. Roth: And hand them to the court for its scrutiny, and proceed with the others?

(Testimony of J. E. Meaney)

Mr. Cooper: Certainly. I might suggest that Sunset number, we may have a clue to that. That is the Universal number.

The Witness: Sunset 22171: [358]

Mr. Roth: That is the way I read it originally, only Mr. Meaney thought it was a "3."

The Witness: You are right—"22171." That doesn't indicate a thing about it. Someone wrote the number down and filed this record of that date. Your guess would be as good as mine.

Q. Suppose my telephone number were on there, with my name opposite it, would that indicate anything to you?

A. Yes; I would assume that the girl gave you a try and asked you if you knew where Mr. Cummings was.

Q. Wouldn't you assume, with the telephone number of Universal on there, and Universal being the sender of the message, that the service operator at Van Nuys either called Universal for additional information as to the address of Robert Cummings, or told Universal that the message had not been delivered?

A. The reason I can't say that is because, if that was done, the girl should have at least completed the memorandum showing just what disposition was made.

Mr. Cooper: I suggest also that the 11th was Sunday, and maybe they didn't get it.

Q. By Mr. Roth: We will now proceed with the second wire.

A. That apparently went through like we like to see them go through.

Q. I show you now a wire which, in the upper left-hand corner, has the letters "SW201 90," and that is addressed to [359] Robert Cummings care Oscar Cummins, 8511 Sunset Boulevard, Los Angeles, California, and it

(Testimony of J. E. Meaney)

is signed "Universal Pictures Co. Inc., Edward Muhl, Assistant Secretary." At the bottom in what purports to be a stamped box, that is, a box made with a stamp—

A. Rubber stamp, apparently.

Q. You have a telephone number, with the number in handwriting, "Br 04065," and then you have, "Telephoned to sister-in-law." The "Telephoned to" is part of the stamp, and "sister-in-law" is in handwriting. Then what is this? A. "Time delivered."

Q. "10:50 A"? A. That is right.

Q. And then you have the stamp "By"?

A. "Cy." That is the operator.

Q. "To"— A. To be filed, "fld."

Q. This is the one that you say went through promptly, like you like to see them go through; is that right? A. Yes.

Q. Now, where did you get that telephone number, "Brighton" or "Bradshaw," "Br 04065"?

A. Well, the office that delivered it, that it was received by for delivery, looked it up in the phone book, or wherever they have their file, if they have confidential numbers—they have records of prominent people, their [360] particular numbers—I couldn't tell you.

Q. But there is no notation on the wire itself which indicates where that telephone number came from?

A. No. The operator that phoned that is in the courtroom. She could answer that.

Q. What is her name?

A. Yorton, Bernice Yorton.

Q. That indicates to you that this message was phoned to the sister-in-law of whom?

A. I couldn't tell you. All I could say is "sister-in-law."

(Testimony of J. E. Meaney)

Q. It is addressed to Robert Cummings, care Oscar Cummins. Is there anything on there which would indicate whose sister-in-law?

A. It is the addressee's sister-in-law, the person's sister-in-law. The addressee is the party that we are interested in getting the telegram to.

Q. Do you mean by the "addressee," Robert Cummings?

A. Yes, sir.

Mr. Roth: We will pass this one for the time being up to the court for its scrutiny.

Q. Now we come to the third one, and that has in its upper lefthand corner these letters and figures, "SW202 90," and at the bottom also a stamped box, and that has in the stamped box, "Telephone No. Brighton 04065."

A. Is that Brighton? [361]

Q. "Br." I am sorry. I mean "Br."

A. Bradshaw.

Q. I will take your word. It is one or the other. And then it is stamped, and it says, "Telephoned to sister-in-law"?

A. That is right.

Q. And then "Time Delivered 10:50 A"?

A. That is right.

Q. And "By" in stamp, and "Cy" in handwriting, and "fld" in handwriting?

A. Filed.

Q. This last wire is addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building, and it is the same operator and the same telephone number and the same notation as to sister-in-law. Does that mean that it is a duplication and that wire was phoned once or twice?

A. No; two separate telegrams.

(Testimony of J. E. Meaney)

Mr. Cooper: If your Honor please, may we have the report that went through to Universal? I think that would be part of the same file, would it not?

The Witness: No.

Mr. Roth: At this point, Mr. Cooper, I prefer the witness not to look at it.

Mr. Cooper: That is all right.

Q. By Mr. Roth: Does this mean, Mr. Meaney, that this message was separately phoned? [362]

A. Oh, yes.

Q. By the same operator? A. Yes.

Q. May I call your attention to the second wire, which is the one "SW201 90." and direct your attention to the fact that the telephone number is exactly the same, "Br 04065." The words "Telephoned to sister-in-law" is exactly the same, the time is exactly the same, and the word "By" is followed by "Cy," exactly the same operator? A. Yes.

Q. Would you still say that it was telephoned twice, but to different people?

A. No. I would say they were both telephoned. That happens frequently where we get a bunch of telegrams; we may have one, two or three going to the same party, and our employee would send that message, and every one dropped on the desk the same thing, and she would phone this one and—

Q. Suppose the message were identical except for address?

A. It wouldn't make a bit of difference, because one is addressed to Oscar Cummins at 8511 Sunset—

Q. No, you are wrong. They are both addressed to Robert Cummings, one in care of Oscar Cummins, 8511

(Testimony of J. E. Meaney)

Sunset Boulevard, and the other to Robert Cummings, care Oscar Cummins, 527 California Bank Building.

A. They were addressed in care of Oscar Cummins at a different address than this one; so the operator, knowing [363] there is something in the wind some place—we have these kind of telegrams—and we deliver them as individual telegrams. We couldn't say, "Well, we have delivered one, and we should worry about the second one."

Q. Then what you are testifying to is that each one was separately phoned by the same operator?

A. I would say so.

Q. At least to the same telephone number?

A. Oh, yes.

Q. Now, if they were separately phoned wouldn't the time of phoning be different?

A. Yes, it should be. It is supposed to be, because you couldn't file your telegrams like that at the same minute,—I mean phone them, so there should be two or three minutes one way or the other.

Q. Attached to the third, which has been identified as "SW202 90," you have some memoranda. It is all in type. It is addressed "Universal Pictures Co. Inc., Edward Muhl, assistant secretary," and then it says "WUX LOSA." What does that mean?

A. "WUX" is the symbol for a company that has a direct teleprinter connection with our office.

Q. Does that mean that these duplicate or apparently carbon data were teleprinted into Universal on that day?

A. That is right.

(Testimony of J. E. Meaney)

Q. The date it was teleprinted into Universal, is what, [364] as indicated by this data?

A. From this copy I could not tell you, because the girl who typed this failed to put the date on it.

Q. Let us read what it says: "Your telegram to Robert Cummings (Report Dely) care Oscar Cummins 527 California Bank Bldg was foned to his sisterinlaw at 1050 AM who will relay Msg to him." It is signed "Western Union Tele Co." A. That is right.

Q. But the date of that teletyped message is not on there?

A. This is a carbon copy, and the original would probably have it on there.

Q. That is right. I didn't think the second page was part of the first, but they are apparently one. It goes on to say at the top of this second carbon sheet—These initials in the corner, "SVC," what does that mean?

A. Service. It also has at the top, "Universal Studios WUX LOSA." That means Los Angeles. "LOSA" means Los Angeles.

Q. Do these figures mean anything, "10 611P"?

A. Yes. That is a description of this telegram, the 10th, filed at 6:11 p. m.

Q. "Robert Cummings care Oscar Cummins 527 California Bank Bldg closed till AM 8511 Sunset Blvd closed till AM 14111 Sherman Way Van Nuys out of city address unkn", and then a dash, and "We foned to Mrs. Oscar Cummins who will relay message." And at the bottom you have "Beverly Hills, [365] Calif 11."

A. Yes.

(Testimony of J. E. Meaney)

Q. Where, on any of your other data connected with any of these wires, do you have a report that the message was phoned to Mrs. Oscar Cummins?

A. This message here, this service here, refers to this telegram.

The Court: For the purpose of the record, will counsel indicate to the reporter what the witness is pointing to?

Mr. Roth: Yes. The witness is indicating duplicate teletyped message which I have just read, and which is undated. If it is a duplicate of the original of Plaintiff's Exhibit 1 in evidence, it apparently was sent on April 12th. The witness is referring to that in connection with a wire which is identified in the upper lefthand corner as "SW202 90."

The Court: And the wire referred to is also a part of the files of the Western Union Telegraph Company?

Mr. Roth: That is correct.

The Witness: The same person that prepared this service message to the Universal Studios is the same person that telephoned the message, and she used a different description in servicing Universal Studios by saying that she phoned it to Mrs. Oscar Cummins, where, in the telegram, she said she phoned it to Mr. Cummings' sister-in-law.

Q. By Mr. Roth: Do you assume from that that the person who phoned the message just assumed that Mrs. Oscar Cummins [366] was the sister-in-law of Robert Cummings? A. Sure.

Mr. Cooper: If your Honor please, there will be more proof put on on that subject later.

Mr. Roth: I think we have examined at least the original data of the Western Union Company file on this subject to our satisfaction, and we are prepared to sti-

(Testimony of J. E. Meaney)

pulate that that data, or photostatic copies, in the event the court is willing and counsel wants to substitute photostats thereof, may be substituted for the originals.

Mr. Cooper: The witness' testimony is in. Just let the testimony stand as it is.

Mr. Roth: I am offering that stipulation, that this testimony, plus the data, be part of the record.

Mr. Cooper: I accept the stipulation. I have some further questions to address to the witness, however.

The Court: Just a moment. Are you able to tell us, Mr. Meaney, how you determined that the operator who is designated by the initials "CY" in the wires which are a part of the file which you just brought here, is the same person who sent the teleprint message to Universal, a copy of which was just read?

A. I can in this particular case, your Honor, because this is a carbon copy, and the girls, when they prepare service messages, are always supposed to put their initials on, and those are checked in the lower lefthand corner, and [367] in this case she did put that there. You will notice the "CY" on this, and the "CY" there, and the phone number.

Q. That notation to which you called our attention appears in the lower lefthand corner of the carbon copy of the teleprint message, which purports to refer to all three telegrams?

A. No. This, your Honor, refers to this particular message alone, and I identify that by the date and the filing time immediately prior to the addressee's name. This is our form of identifying a particular telegram.

(Testimony of J. E. Meaney)

The Court: But in the body of the teletype message reference is made to all three telegrams.

A. No. This just refers to this particular one, but it refers to various addresses where they tried to deliver them. There are three addresses in there.

The Court: Very well. Have you some further questions?

Mr. Cooper: Yes, your Honor.

Redirect Examination

Q. By Mr. Cooper: May I have that portion of your records wherein you report delivery to the secretary? That is the first one, that has "S114 90" in the upper left-hand corner. According to the records of your office, notwithstanding the fact that you reported to Universal that you were unable to obtain delivery on this one, your records do show that one of your operators did get delivery by phoning it to Sunset 22636, and delivering the message, S114 90, to the [368] secretary of Robert Cummings? A. Yes.

Q. That was not reported to Universal, however?

A. I couldn't say that, because there is nothing indicating in the file that it was reported.

Q. With respect to the numbers "Brighton" and "Bradshaw," there are occasions when employees of your office do not always follow instructions literally; is that correct? A. Yes, unfortunately.

Q. And it might be "Brighton" or it might be "Bradshaw"? A. That is correct.

Mr. Cooper: That is all.

Mr. Roth: I have no questions.

Mr. Cooper: If your Honor please, I have the other people here. Should I call them at this time, or does your Honor prefer that I wait until 2:00 o'clock? We have them here, and we would like to call them.

The Court: I presume you will be finished with them in a comparatively short time?

Mr. Cooper: Yes, your Honor. Mr. James, please.
[369]

G. B. JAMES,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. G. B. James.

Direct Examination

Q. By Mr. Cooper: Mr. James, you are employed by the Western Union Telegraph Company?

A. Yes, sir.

Q. And have been for approximately how long?

A. At Van Nuys, I have been there four years. I have been with the company off and on for twenty-five.

Q. You were employed on April 10th and 11th of this year? A. Yes.

Q. Where were you working at that time, on those dates, April 10th and 11th?

A. Well, I was working at the Western Union, at Van Nuys.

Q. At Van Nuys? A. Yes.

Q. What were your duties at the Van Nuys office of Western Union Telegraph Company on those days? In what capacity were you employed?

A. Well, I was employed as night manager at present.

(Testimony of G. B. James)

Mr. Roth: Would the court ask the witness to please speak up, so that we can hear him?

The Witness: I act as night manager at the present, and [370] have been since I started, for the last four years.

Q. In other words, on April 10th and 11th, you were the night manager? A. Yes.

Q. I show you a telegram, the one that has "S 114 90" on it, and ask you if your handwriting appears on the telegram at any place? A. Yes, it does.

Q. Where is your handwriting on this telegram?

A. Right here.

Q. You indicated "fone Cr 68798"?

A. Crestview.

Q. And "607 N. Elm Dr., Beverly Hills," is that also in your handwriting? A. Yes, sir.

Q. Does your handwriting appear at any other place on this telegram? A. Right there.

Q. The letter "B," is that your handwriting?

A. Yes, sir.

Q. Is "Da 855A" yours? A. Yes, sir.

Q. Is "Su 22636" your handwriting?

A. Yes, sir.

Q. Is "Adse Secy" your handwriting?

A. Yes. [371]

Q. Do you have an independent recollection or any recollection of what you did when this message came in?

A. Well, I tried to deliver the message. I sent the message out to his residence.

Q. In other words, you actually tried to deliver it physically by messenger? A. Yes, sir.

Q. What happened?

A. He wasn't home, nobody home.

(Testimony of G. B. James)

Q. Then what did you do?

A. Well, I tried to phone it. I endeavored to phone it and deliver the message in every way I could.

Q. Did you phone "Crestview 68798"?

A. Well, I tried that, undoubtedly, and I must have gotten the number. I don't know where that came in, but I tried that, anyway, and it wasn't delivered at that number.

Q. Do you have any recollection of having talked to anybody and having delivered this message to anyone?

A. Yes, sir.

Q. To whom?

A. To the secretary of Robert Cummings.

Q. You phoned what number?

A. Sunset 22636.

Q. And someone answered? A. Yes, sir.

Q. Do you have any recollection of what your conversation [372] was?

A. Yes. I talked to the lady, and I says, "I have a message for Robert Cummings. Who is this speaking now? Is he there?" And the lady answered and said, "I am his secretary, and may I take the message?"

Q. Then what did you do?

A. She says, "Can I take the message," and I says, "Well, can you take a message for him?" And she said, "Yes, I will be glad to take it." And I says, "Do you know where he is or where we can get in touch with him?" And she says, "I will deliver the message to him."

Q. I want you to tell us what you said to her on the telephone. Did you read the message?

A. I phoned the whole message to her.

(Testimony of G. B. James)

Q. State into the record exactly what you said to her.

A. I said to her, "I have a message for Robert Cummings and I would like to deliver it to him. Will you take the message?" And she said, "I will be glad to take the message and deliver it to him."

Q. Tell us what you read to her.

A. The whole message.

Q. I want you to read it.

A. "I have a message for Robert Cummings from Beverly Hills, California: 'You are hereby instructed to report to us at our studio at Universal City, California at the office of Mr. Dan Kelley at ten o'clock Monday morning April 12, [373] 1943 for the rendition of your services under your contract of employment with us dated November 21, 1938 as heretofore amended and extended in connection with the portrayal of a role in our photoplay now entitled *fired wife* and or the rendition of such other services as we may require under said contract as amended and extended.' Signed 'Universal Pictures Company Inc., Edward Muhl, Assistant Secretary.'"

Q. Do you recall whether she said anything to you after that?

A. I asked her where he was, and she said she didn't know at the present time, but she would deliver the message to him.

Mr. Cooper: That is all. You may cross examine.

The Court: Just a moment, please.

Mr. Cooper: One further question.

Q. Have you talked to me at all before you came into the courtroom?

A. No, sir, I never met you before.

Mr. Cooper: That is all.

(Testimony of G. B. James)

Cross-Examination

Q. By Mr. Roth: Did you talk to Mr. Abbott?

A. No, sir. No one in the office.

Q. Did you talk to me?

A. No, I haven't talked to you.

Q. Mr. James, why do you use the initial "B"?

A. Well, every operator that works at an office is [374] assigned "B" or identifies himself in case of a mistake or something happens to a telegram in a case like this.

Q. I understood you to testify that you were the night operator?

A. Night manager.

Q. You were then and are now?

A. Well, I am now clerk, and, in fact, I am operator, clerk and counter clerk and teletype operator, whatever there may be.

Q. Are there any assistants there in that Van Nuys office?

A. Assistants—well, no, there are no assistants there. There have got a manager and a night manager, and we have girls.

Q. On this day of April 10th, can you tell from the message which you have in front of you, and which is identified by the letter "S" and the figures "114 90," when you received that at the Van Nuys office?

A. That was received at 7:03 p. m.

Q. At the Van Nuys office? A. Yes.

Q. How long had you been on duty?

A. Well, I was on duty—I am on some days from 9:00 or 10:00.

(Testimony of G. B. James)

Q. On that day when you came to the office, what was your shift on that day, that is, on April 10th, 1943? [375]

A. Well, I really don't know. It was either 1:30 to 9:00, or, if it was Sunday, the hours were from 8:00 to 12:00 and 2:00 to 6:00—8:00 in the morning to 2:00 in the afternoon, and then 2:00 to 6:00.

Q. And if it were Saturday—

A. They would be from 1:30 to 10:30.

Q. From 1:30 in the afternoon until 10:30 in the evening? A. Yes.

Mr. Roth: The 10th, I think we can stipulate, was a Saturday.

Mr. Cooper: That is correct.

Mr. Roth: And the 11th was Sunday.

Mr. Cooper: That is correct.

Mr. Roth: And the 12th was Monday.

Mr. Cooper: That is correct.

Q. By Mr. Roth: The date that is on that wire— you received it on the 10th? A. Yes.

Q. At the Van Nuys office, a little after 7:00 o'clock?

A. Yes.

Q. Did you do anything with it then?

A. Sent it out to his house.

Q. Who did you send it with?

A. This delivery messenger.

Q. Do you know who that was?

A. I don't recall now, we have so many there, and they [376] are quitting all the time.

Q. Did you get a report from the messenger?

A. I got a report from the messenger that he wasn't home.

Q. Did you write that up? Having refreshed your memory by looking at the data in the file on that particular

(Testimony of G. B. James)

telegram, can you tell us when you sent it for physical delivery or by messenger boy, and who the boy was?

A. Well, I couldn't say. I really couldn't recall the messenger boy's name.

Q. Well, tell us when you sent it by physical delivery.

A. It was sent out within an hour from the time it was delivered to me.

Q. Is there anything in the data that you hold in your hand which indicates that that was so?

A. Yes. We try, and if we can't get delivery then by phone, because the telephone is disconnected or we couldn't get him at his home, if that is the case, then we always try to deliver them.

Q. What was the first thing you did? Tell us the first thing you did.

A. You want to know the first thing I did?

Mr. Roth: Just a moment.

The Court: Just a moment.

Q. By Mr. Roth: The first thing you did when that message came in on Saturday night, you phoned and they said the phone was disconnected, is that right? [377]

A. Either disconnected—I wouldn't positively say, but occasionally the report from the messenger was that he was unable to deliver the message.

Q. I am trying to find out what you did before you gave it to the messenger boy.

A. I tried to phone the message, and he either didn't answer or the phone was disconnected.

Q. The phone was disconnected at that time?

A. Yes.

Q. Then you testified on direct, in answer to one of Mr. Cooper's questions, that you made this telephone call

(Testimony of G. B. James)

to the Elm Drive address at Beverly Hills. Did you make that call?

A. Yes, I made that call. That is my writing on there. I made the call.

Q. May I call your attention to this inter-office message, attached to the original wire, which says, "Relay Robert Cummings Phone Crestview 67898 607 North Elm Beverly Hills unkn." Doesn't that indicate to you that you asked Beverly Hills to make the telephone call, and they sent back that message to you, telling you that Robert Cummings was unknown there?

A. That is right.

Q. Then you didn't make the call to the Elm Drive number, did you?

A. Well, anyway, it was phoned; it was relayed to Beverly Hills to be phoned. [378]

Q. But you did not make the call? A. No.

Q. Now, Mr. James, having ascertained that the telephone at Robert Cummings' home was disconnected on Saturday night, why didn't you send the message by messenger on Sunday morning?

A. Sunday morning we got a report that he was out of the city and that he was unknown.

Q. Where do you find that?

A. That was in Beverly Hills. Beg pardon.

Q. That was not your office? A. No.

Q. My question is, the pending question is, having ascertained Saturday night that the phone was disconnected, and your messenger boy having come back unable to make physical delivery of the telegram, why didn't you, on Sunday morning, between the hours of 8:00 and 12:00,

(Testimony of G. B. James)

when you were on duty, send the messenger out to physically deliver the telegram to Robert Cummings' address?

A. Sunday morning we ascertained the telephone number of Sunset 22636, and it was phoned to his secretary.

Q. Well, what telephone number did you call on Saturday night, when you found out that the phone was disconnected?

A. Well, we would have the phone number out there. I don't know what the reason was, whether it had been destroyed or not, but we did have a phone number. [379]

Q. I am just asking. Is this a possible construction. Mr. James, of your notations on the bottom of this wire, that you were advised by the Los Angeles office or the Beverly Hills office that they had phoned the Cummings message to Cummings' sister-in-law?

A. Well, this writing at the bottom here was ascertained by one of our clerks out there. I didn't get that Bradshaw number. She got that.

Q. You mean the "Br" number?

A. Yes, sir.

Q. Doesn't the fact that this "Br" number is on the bottom of this wire, plus the fact that the same "Br" number is on the other two wires, indicate that the message was actually phoned by the Beverly Hills and/or the Los Angeles office, and your office was given the information?

A. Yes; we got the information. I don't know where it was ascertained, but we did get the information.

Q. Let me ask you another question: Isn't it true that those numbers down there on the face of that wire, that the name "Oscar Cummins" is not in your handwriting?

A. No, sir.

(Testimony of G. B. James)

Q. And the number, "Br 04065," is not in your handwriting, is it? A. No.

Q. And the figure "11th," is that your handwriting?

A. Yes, sir. [380]

Q. Isn't the fact that that "Br" is there, and that it has the name "Oscar Cummins" and has a number there, under that message, doesn't it have some significance to you? In other words, why is it on there?

A. Well, that was put on there, attempting to phone to Bradshaw 04065.

Mr. Roth: I have no further questions.

Redirect Examination

Q. By Mr. Cooper: One more question, and I want you to answer this honestly, to the best of your recollection.

Mr. Roth: We assume that he will answer honestly.

Q. By Mr. Cooper: Do you have an independent recollection that you made this phone call to the secretary, or are you just guessing?

A. No. I have a recollection of phoning it to her, to a lady who posed as his secretary.

Mr. Cooper: That is all.

Recross-Examination

Q. By Mr. Roth: Suppose I told you, Mr. James, that Robert Cummings had no secretary, would your testimony still be the same? Would you be as sure of your recollection as you apparently are?

A. I am sure. You say, if he didn't have a secretary?

Mr. Roth: Would you read the question, please?

(Question read by the reporter.)

A. I am sure of my recollection. [381]

(Testimony of G. B. James)

Q. Are you sure that the person at the other end of the line said that she was his secretary?

A. Yes, I am positive she said, "I am Robert Cummings' secretary, and I will be glad to take the message."

Q. When you started to read the message to the person at the other end of the line did she ask you to hold up reading it, so that she could get her book and take it down?

A. She did say that she would write it down, that she would write the message down.

Q. Did she ask you to read it slowly, so that she could write it down?

A. I read the telegram very slowly—not very slowly, but quite—I read the telegram—I didn't read it so awful slow, but she was taking it down. She took it down.

Q. She didn't ask you to hold the line while she got a book?

A. She said she would take it down.

Q. My question was, did she ask you to hold the line a minute so that she could go and get a book and pencil?

A. She didn't say that. She said, "I will take the message."

Q. Did she say, "I will take the message"?

A. She said, "I will take the message down."

Q. And then she ended up by saying that she would deliver it?

A. She would deliver it to Mr. Cummings. And I asked [382] her where Mr. Cummings was, so that we might deliver it to him, but she said she didn't know, and she would deliver the message.

Mr. Roth: That is all.

Mr. Cooper: If your Honor please, I guess we had better save the other until 2:00 o'clock. I will be very

(Testimony of G. B. James)

happy to proceed in any way your Honor desires.

The Court: Do you anticipate that the testimony of that witness will be as long as this witness?

Mr. Cooper: I am afraid it will, if your Honor please.

The Court: Very well. You may step down, Mr. James. I am disturbed about the amount of time that will be available this afternoon, and, while I am satisfied that we shall likely have the time to hear the other witnesses, I have grave doubt about giving you time for the additional oral argument. Did you say you have a trial scheduled to begin in the morning?

Mr. Cooper: Yes, your Honor, in Judge Harrison's court, at 10:00 o'clock, a jury trial. I am sure he would be very unhappy if we were not to proceed. I might try to make arrangements to put it over until 2:00 o'clock, in view of our present situation.

Mr. Roth: I think if that could be done without imposing upon Judge Harrison it would be helpful all around, because we are prepared to finish the oral argument, and we won't be unduly long, and the matter can be then concluded. I would [383] want to make this request of the court, in view of the evidence put on in respect of this telegram. Robert Cummings is up at Oxnard today, but we can get him down here, and I would like to put him back on the stand, at least to testify as to that house in Van Nuys. It is general knowledge that the house was closed during all that period of time, and I would like to put that evidence on. It shouldn't take long, and I can have him here the first thing in the morning.

Mr. Cooper: I might state the further nature of our testimony, so that counsel might be prepared to anticipate it.

(Testimony of G. B. James)

Mr. Roth: I may even stipulate it.

Mr. Cooper: You may. I intend to put on several witnesses. I intend to call Oscar Cummins first, to ask him if it wasn't a fact that he had represented himself as a half brother of Robert Cummings, and I will have several witnesses to whom he made that statement.

Mr. Roth: I may stipulate to that. I will tell you at 2:00 o'clock.

Mr. Cooper: All right.

The Court: I am not sure that we have any evidence as to what was the nature of the establishment at 8511 Sunset Boulevard.

Mr. Roth: That is an office building, that has been closed, I think, for several months, thirteen months. It was a place at which Oscar Cummins had an address some years ago.

Mr. Cooper: If you offer to stipulate to the other, I [384] might—

Mr. Roth: I don't know all the facts, but I will talk it over with you when we adjourn and tell you what the facts are, and if you want to investigate them, all right.

The Court: We will resume at 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., of the same day, Monday, January 10, 1944.) [385]

Los Angeles, California, Monday, January 10, 1944;
2:00 P. M.

(Parties present as before.)

The Court: I was going to suggest to counsel in the case on trial that we have about an hour available this afternoon, and that we can convene in the morning in advance of the regular hour. But it will be necessary for your case to begin at 11:00 o'clock, Mr. Cooper, and I am suggesting, therefore, that counsel keep these facts in mind. Do you want to convene at 9:00 o'clock in the morning?

Mr. Roth: That will be perfectly satisfactory.

Mr. Cooper: Whatever is convenient to counsel and the court. Bernice Yorton, please come forward.

BERNICE YORTON,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Bernice Yorton.

Direct Examination

Q. By Mr. Cooper: Miss Yorton, in April of this year were you employed by Western Union Telegraph Company? A. I was.

Q. Are you employed by them now?

A. No, I am not.

Q. When did you leave the employ of Western Union [386] Telegraph Company, approximately?

A. About August 21st.

Q. In April of 1943 at what branch or office of Western Union were you employed?

A. At Beverly Hills.

(Testimony of Bernice Yorton)

Q. In what capacity?

A. Teletype operator and clerk.

Q. Do you recall whether or not you were actually working on Saturday afternoon, the 10th of April?

A. Yes, I was.

Q. Now, I show you three telegrams, being Defendant's Exhibit B in evidence, and ask you if you recognize those telegrams as telegrams that you have seen before?

A. Well, I never have seen these, because I see this is stamped in at 6:17, and I was not at work then.

Q. Did you work the next day, Sunday, the 11th?

A. Yes, I did.

Q. Did you do something with reference to the telegrams I have just shown you?

A. Well, I tried to get in touch with the addressee.

Q. I show you three other telegrams, being the same messages as the telegrams in Defendant's Exhibit B, and ask you to examine those three and tell me which one of these, or, if more than one, which ones you tried to deliver, and how?

A. These two telegrams. [387]

Q. The two you are referring to are the one with the number "SW201 90" in the upper lefthand corner, Robert Cummings, care Oscar Cummins, 8511 Sunset Boulevard, and the second "SW202 90" in the upper lefthand corner, addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building; is that correct?

A. Yes.

Q. In what form did the message come to you?

A. Well, the message came to me just the way it is here.

Q. Did you have these two physical documents before you?

A. Yes, I did.

(Testimony of Bernice Yorton)

Q. Is there something on these documents that you could identify?

A. Well, my initials down here in the corner.

Q. The "Cy"? A. Yes.

Q. Is the "Br 04065" in your handwriting?

A. Yes, sir.

Q. Is the "Sister-in-law" your handwriting?

A. Yes, sir.

Q. Is the "10:50 A" your handwriting?

A. Yes, sir.

Q. And "fld," is that your handwriting?

A. Yes.

Q. And likewise the notations on the other telegram?
I think they are identical. [388]

A. Yes, sir.

Q. Tell us just exactly what you did when you were given these two messages to deliver.

A. Well, I believe service called the studio, Universal, to try and get Robert Cummings' phone number, and they gave me a phone number out in the valley, and I believe I talked to his mother.

Q. To whose mother?

A. To Robert Cummings' mother.

Q. You phoned someone out in the valley and talked to someone you believed was Robert Cummings' mother?

A. Yes.

Q. Did you deliver the message to her?

A. I asked her if he was there, and she said no, and she gave me this Brighton phone number, saying it was Oscar Cummins' number, who was Robert Cummings' brother, and he possibly would know where Robert Cummings was. I called there and was—

(Testimony of Bernice Yorton)

Q. Where?

A. The Brighton number, the one on there.

Q. Brighton 04065?

A. Yes. And Oscar Cummins wasn't there.

Q. Pardon me. When you called "Br 04065," did someone answer the phone?

A. Yes; a woman answered.

Q. What did you say to her and what did she say to you? [389]

A. I told her I had a telegram for Robert Cummings, in care of Oscar Cummins, and she said neither one of them was there, but she was Oscar Cummins' wife and she would take the messages. Both telegrams were exactly the same and I only read one of them to her. I told her we had two and I only read one. And she said she would give him the message, and that was all.

Q. What did you mean by "sister-in-law"?

A. She said she was Oscar Cummins' wife, and I believed Oscar Cummins was Robert Cummings' brother, so that made her the sister-in-law.

Mr. Cooper: You may cross examine.

Cross-Examination

Q. By Mr. Roth: When did you get there on Sunday morning? A. 7:00 o'clock in the morning.

Q. When were the telegrams handed to you?

A. I believe they were already there, because they came in the Saturday night before.

Q. Did you pick them up?

A. I don't exactly remember.

Q. Did anyone give them to you?

A. I couldn't tell you. There were only two of us in the office, and I don't know who saw it first.

(Testimony of Bernice Yorton)

Q. Do you know whether anyone called before you called?

A. No, I don't know. There weren't any notations on the telegram on that. [390]

Q. Do you remember what number you called in the valley?

A. It was a Sunset number, but I don't know what it was. I didn't write it down.

Q. Was there a phone call made to that Brighton number at 8:55 that Sunday morning?

A. I don't know.

Q. If there was one made, you didn't make it?

A. Well, I might have made it and gotten no answer. I don't remember. I didn't note it on the telegram, if I did.

Q. What time did you call the valley and talk to the mother or the woman who said she was the mother of Mr. Robert Cummings?

A. Sometime from 7:00 to 10:00. I don't know when.

Q. Can you fix the time with respect to the time you actually called the Brighton number?

A. I would say somewhere around 10:00 o'clock.

Q. The notation in your handwriting on the telegram shows that you called the Brighton number at 10:50.

A. Yes.

Q. So you spoke to the woman who said she was Mrs. Robert Cummings, Robert Cummings' mother, sometime around 10:00 o'clock that same morning?

A. Between 10:00 and 10:50 somewhere.

Q. When did you call Universal?

A. I called Universal between 10:00 and 10.50.

(Testimony of Bernice Yorton)

Q. Who did you talk to? [391]

A. I don't know.

Q. Who did you ask for?

A. I just simply stated that I had these telegrams for Robert Cummings, and that I couldn't find the phone number, and could they give me some idea where to reach him, because the California Bank address was closed and I couldn't get anybody there.

Q. Did you also try the Sunset Boulevard address?

A. I didn't, no. Both telegrams came in at the same time, and they were both the same, and I tried to get someone.

Q. Did you know that one of the telegrams was at the Van Nuys office? A. No, I didn't.

Q. Did you know that some message had been sent in by the Van Nuys office suggesting that a number on Elm Drive in Beverly Hills be called?

A. I don't believe I did know that.

Q. I will show you what purports to be an inter-office communication between the Van Nuys office and the Beverly Hills office, or, the other way around, which reads as follows: "Relay Robert Cummings phone Crestview 67898 607 North Elm Beverly Hills **unkn.**" Did you see that message before you called the Brighton number, or before you called Universal?

A. No, I didn't see that message at all, because that went to Van Nuys.

Q. From your office? [392]

A. No. It went to Van Nuys from the Los Angeles office.

Q. Not from the Beverly Hills office? A. No.

(Testimony of Bernice Yorton)

Q. You didn't know anything about this message?

A. No, I didn't.

Q. Now, when you called the Brighton number, you are sure it was about 10:50 in the morning?

A. Yes, it was.

Q. Do you write the time down before you start reading or after you start?

A. After I start reading.

Q. Did you get this number the moment you tried it?

A. Yes, I believe I did.

Q. Did the woman answer the phone immediately?

A. Yes.

Q. What did she say?

A. Well, I said that I had a telegram for Robert Cummings, and was he there, or Oscar Cummins, and she said no, he wasn't there.

Q. Then what was said?

A. She said that she was Oscar Cummins' wife, and that she would take the message. So I read just the one telegram to her, and I told her that we had both of them the same, but I only read one, and that was all.

Q. Are you sure she said she was Oscar Cummins' wife? A. I believe she said that. [393]

Q. Did you ask her to take down the message?

A. Well, I wouldn't want to say that I did. She just said that she would take the message, and I read the telegram to her. I read it slow enough so that she could have written it down.

Q. Did you tell her you had two wires?

A. Yes.

(Testimony of Bernice Yorton)

Q. But you didn't read her the other one?

A. No. I told her they were both the same, and she said only one was necessary.

Q. Did you tell her where the other was addressed to?

A. Yes, one was addressed to the California Bank Building, and the other to the Sunset address.

Q. Did she make any comment about the Sunset Boulevard address?

A. No. As a matter of fact, she didn't seem very anxious about the message.

Q. What caused you to think that?

A. Usually when you call up people and tell them you have a message for them or somebody in their family, they at least seem interested enough to know what it is about. She didn't seem to care.

Q. How could you tell that?

A. By her tone of voice.

Q. What did she say besides saying, "I am Oscar Cummins' wife"? [394]

A. She said she was Oscar Cummins' wife and she would take the message.

Q. What else did she say?

A. Well, I guess that is all she said. When I told her we had a telegram, I don't know, she just didn't sound very enthusiastic about it.

Q. I understood you, in recapitulating the conversation, to say, when you got on the stand, that you said you had a wire for Robert Cummings, and she said he wasn't there, and you said it was in care of Oscar Cummins, and she said, "I am Oscar Cummins' wife."

(Testimony of Bernice Yorton)

Other than that, what did she say before you started reading the telegram?

A. Nothing—I don't think she did.

Q. From what you have given us here on the witness stand, you don't think she was very enthusiastic?

A. No, I don't think so. She might have been dropping an "ah" in there somewhere.

Q. When you finished the telegram, what was said?

A. She just said, "Thank you," and I said, "You are welcome," and hung up.

Mr. Roth: That is all.

Redirect Examination

Q. By Mr. Cooper: Is there some way that you remember this conversation?

A. Oh, I remember the whole thing very clearly, because I had to make so many phone calls. [395]

Q. To deliver this one message?

A. Yes.

Mr. Cooper: That is all.

Recross-Examination

Q. By Mr. Roth: You say you had to make some phone calls besides to Robert Cummings and to the Universal?

A. And Mrs. Cummins.

Q. Are you testifying that it is unusual for you to make more than two or three phone calls in order to get the addressee of a message?

A. Yes, it is; for one telegram, it is very unusual to have to phone three different places.

Q. And that is what impressed this on your memory?

A. Yes.

(Testimony of Bernice Yorton)

Q. Anything else?

A. And because it was for a person who was well known.

Mr. Roth: That is all.

Mr. Cooper: That is all. Are there any questions the court has?

The Court: What was the number of the telephone where the lady told you that she was Mrs. Oscar Cummins? A. That was this Brighton 04065.

The Court: Brighton what? A. 04065.

Mr. Roth: May I ask another question, your Honor?

The Court: Yes. [396]

Q. By Mr. Roth: When you relayed this to the woman who said she was Oscar Cummins' mother—

A. Robert Cummings' mother.

Q. Did you offer to read to her the wire?

A. No, I don't believe I did. She said for me to call this other number and they would take care of it, and that is why I didn't offer to read her the wire, was because she didn't ask me to.

Q. And are you sure this lady whom you talked to, who said she was Robert Cummings' mother, didn't tell you that Robert Cummings was out of town?

A. I believe she told me he was in the Army, that he wasn't in town, he was in the Army.

Mr. Roth: That is all.

(Testimony of Bernice Yorton)

Redirect Examination

Q. By Mr. Cooper: What else did this lady tell you?

A. That is about all.

Q. After she told you he was in the Army, why did you try to get him?

A. Everything was very vague at the time as to where he was. She said he was in the Army, and then she told me to call this Oscar Cummins number and I could get in touch with him through them, and that is why I called this other number.

Q. At the time she told you to call Oscar Cummins' number, she also told you to call that number because Oscar Cummins was his brother? [297]

A. Because Oscar Cummins was his brother; I believe that is what she said.

Q. Aren't you sure?

A. It is all kind of—but she said he was his brother, I believe is what she said. That is what I understood.

Q. If you can, and I don't mean to press you too much on this, I would like to have you take your mind back to the conversation with the lady who said she was Robert Cummings' mother, and tell me what you said and what she said, from the moment you got on the telephone.

A. Well, I just said, "This is Western Union and we have a telegram for Robert Cummings, and was he there," and she said, "No," that he wasn't, and I asked her where we could get in touch with him, and she said, told me to call this Brighton number and talk to Oscar Cummins, and she said he was in the Army, and I believe was stationed at Santa Barbara, or something, but she said I could get in touch with him through the Oscar Cummins' number, and that is about all that was said.

(Testimony of Bernice Yorton)

Q. Did she ask you to read her the telegram?

A. No, she didn't.

Q. Did you offer to read it to her? A. No.

Q. Did you tell her who the telegram was from?

A. No.

Mr. Cooper: That is all. [398]

Mr. Roth: That is all.

Mr. Cooper: Counsel, with reference to the stipulation as to Oscar Cummins having represented himself as a half brother of Robert Cummings, I understand you are willing to stipulate that he has informed people at Universal of that fact. Is that true?

Mr. Roth: Not "people." I am willing to stipulate that once, in the presence of Dan Kelley, and possibly in the presence of Mr. Muhl, either Robert Cummings or Oscar Cummins referred to each other as half brothers. I am willing to stipulate to that.

Mr. Cooper: I will accept that, but I would like to call another witness for one question. I am going to suggest a further stipulation, that Robert Cummings also told Bob Speers the same thing, that he was a half brother of—

Mr. Roth: I don't know anything about Speers.

Mr. Cooper: That is about the only question. I wanted to call Bob Speers for that.

Mr. Roth: I will stipulate to that.

Mr. Cooper: Very well. May we have a stipulation about that "Br" number, Brighton 04065?

Mr. Roth: We stipulate that that number, Brighton 04065, is and was the listed telephone number of Oscar Cummins.

Mr. Cooper: We will so stipulate. We rest, your Honor.

Mr. Roth: We have rested, and we do rest, except for this new matter in respect of this telegram, in which matter [399] I suggested this morning to the court that I would like to bring Bob Cummings in to testify that his home was closed on these particular dates and there was no one there. And since hearing the last witness, who testified that she spoke to Bob Cummings' mother, I would like to bring her in.

Mr. Cooper: I think you should. I am not in a position to stipulate to it. If there was some basis on which I could stipulate, I would be very happy to do so.

The Court: Will you have them here at 9:00 o'clock in the morning?

Mr. Roth: We have telephoned Robert Cummings already, and he will be back tomorrow, and we will make every endeavor to get him here by 9:00 o'clock tomorrow morning. And I am certain, unless she is ill, if his mother is in good health, we will have her here at 9:00 o'clock in the morning.

Mr. Cooper: If your Honor please, neither of us has offered the telegrams of which we inquired of Mr. Meaney. Does your Honor desire to have those offered in evidence, or does your Honor have sufficient information?

The Court: I think if we just have an understanding with Mr. Meaney, of the Western Union, that they will hold onto those records, that we will not ask at this time at least, that they be made a part of the court's file.

Mr. Cooper: The record may show that I am handing these records to Mr. Meaney.

The Court: Mr. Meaney, is there any likelihood of those [400] records being destroyed?

Mr. Meaney: No. I will be glad to hold them, your Honor.

The Court: Very well, then. I will accept that.

Mr. Cooper: I have been informed that the Federal Communications Commission permits them to be destroyed after three months.

Mr. Roth: I think Mr. Cooper has also agreed that he would stipulate that this Sunset Boulevard address, that that building has been closed for some months prior and some months since the date of that wire.

Mr. Cooper: If you tell me that that is the fact, I will stipulate to it.

Mr. Roth: I understand it to be a fact.

Mr. Cooper: That is perfectly all right. I will accept the stipulation.

The Court: Has been closed how long?

Mr. Roth: Since June 1, 1942.

Mr. Cooper: Let us put it this way, that he moved out of there at what time?

Mr. Roth: May 30, 1942.

Mr. Cooper: And never returned?

Mr. Roth: And never returned. And that the building itself has been closed since that time.

Mr. Cooper: At least I will stipulate it up to the date of the telegram. I think the balance is immaterial.

Mr. Roth: All right. [401]

The Court: Now you may proceed.

(Further argument by Mr. Roth.)

(Whereupon an adjournment was taken until 9:00 o'clock a. m., Tuesday, January 11, 1944.) [402]

Los Angeles, California, Tuesday, January 11, 1944;
9:00 A.M.

(Parties present as before.)

Mr. Roth: Call Mrs. Cummings.

RUTH K. CUMMINGS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Roth: Mrs. Cummings, where do you reside?

A. I live in Van Nuys, 7241 Hazeltine Avenue.

Q. How long have you been living there?

A. Well, since June, 1940.

Q. Is that close to where your son, Robert Cummings, lives?

A. Yes. It is a four-acre tract, and my house is about a block from his house, but it is all within the same fenced tract.

Q. You are the mother of Robert Cummings?

A. I am.

Q. Can you recall whether or not you were called up on a Sunday morning, April 11, 1943, by Western Union?

A. No.

Q. By that you mean that you can recall that you were not called up?

A. Well, I wouldn't be where I could take a message on [403] Sunday.

Q. Were you in your home that Sunday morning?

A. Well, naturally I would be there early in the morning.

(Testimony of Ruth K. Cummings)

Q. Do you have any recollection of having been called up by Western Union and asked to take a message on the Sunday morning of April 11, 1943? A. No.

Q. Do you have any recollection of having been called up by Western Union and asked to take a message, on that Sunday morning, April 11, 1943, for Robert Cummings? A. No, I haven't.

Q. Did you have any conversation with the Western Union telephone operator or Western Union girl on Sunday morning, April 11, 1943? A. No.

Q. At all, on that Sunday morning? A. No.

Q. Did you have any such telephone conversation with the Western Union operator with respect to a message for Robert Cummings on Monday morning, April 12, 1943? A. No.

Q. What is your telephone number, Mrs. Cummings? A. State 52657.

The Court: Was that your telephone number on April 11, 1943?

A. It has been my telephone number ever since I have had [404] a telephone out there. I have had no change.

The Court: Since sometime in 1940?

A. Well, yes, or perhaps later, because I live in my house, which is separate and apart from Robert Cummings' house, and I live alone in my house.

Q. In distance, tell us, if you can, about how far is Robert Cummings' house from your house.

A. Well, it must be nearly a block, to pass through the orchard from his house to my house.

Q. Out there in your house do you hear the telephone ring in Robert Cummings' house? A. No, I cannot.

(Testimony of Ruth K. Cummings)

Q. On the Sunday morning of April 11, 1943, did you hear the telephone ring in Robert Cummings' house?

A. No.

Q. Did you take any message in Robert Cummings' house on that morning?

A. I wouldn't be there to take it, because his house was closed.

Q. Were you there? A. No.

Q. Do you know whether or not Robert Cummings had a secretary residing at his house on April 11, 1943?

A. No, he has no secretary residing in his house. He has never had one.

Q. Do you know that Robert Cummings was not at home on [405] April 11, 1943?

A. Well, he wasn't at home, because he was gone. He had been gone for a year and a half, and his house had been closed. Of course, there were intervals when he came in.

Q. On this particular Sunday morning, do you know whether that was one of the intervals when he was not there? A. Well, I am pretty sure it was.

Mr. Roth: You may cross examine.

Cross-Examination.

Q. By Mr. Cooper: Mrs. Cummings, do you have some way of fixing that date in your mind, as distinguished from other Sundays?

A. Well, Sundays are my days of rest, and I go to service, and, if I don't I stay in my house, so there would be no occasion for me to be answering phones in Bob's house.

(Testimony of Ruth K. Cummings)

Q. What time do you go to services?

A. Well, since I don't drive and there is no one there to drive me, when we have no servants, and we usually have none on Sunday, and at that time I don't think we had any, because Bob was away on other business, and I have to take a street car, and it takes me at least two hours to get into Los Angeles where I go to service.

Q. And the service starts at what time?

A. Well, some places at 10:30, where I go, and some places at 11:00.

Q. You do not go every Sunday, do you? [406]

A. Well, it is my usual custom to go.

Q. There have been some occasions, Mrs. Cummings, when you didn't? A. Naturally.

Q. Mr. Smith is your son's servant? A. Yes.

Q. How long has he been employed by your son, if you know?

A. Well, he was employed before my son moved to the valley. He has been in his employ, I should say, some five years.

Q. Does he work in your son's home?

A. Not now, and hasn't since Bob has been away.

Mr. Cooper: That is all. Thank you very much.

Mr. Roth: Thank you, Mrs. Cummings. That is all.
Robert Cummings. [407]

ROBERT CUMMINGS,

the plaintiff, having been heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination.

Q. By Mr. Roth: Mr. Cummings, do you have a secretary? A. Yes, sir.

Q. Who is that secretary?

A. Bella Marco was the secretary, and just recently, because of the fact that she is going to have a baby, we have another secretary, Miss Lillian Starlap.

Q. Has that secretary ever lived at your home?

A. No, sir.

Q. Where does that secretary work?

A. At 527 California Bank Building.

Q. Is that the office of Oscar Cummins?

A. It is.

Q. Have you ever had Bella Marco or the other girl you mentioned out at your home to take messages for you?

A. No.

Q. Do you know whether or not there was a secretary in your home on Sunday, April 11th, 1943?

A. I have never had a secretary in my home.

Q. Either one of the girls you mentioned?

A. No.

Q. In other words, you have used the secretary of Oscar Cummins, and you refer to her as your secretary?

(Testimony of Robert Cummings)

A. That is right. I pay her a little extra money to take care of my secretarial work.

Q. Has Bella Marco ever been in your home in her life? A. Yes.

Q. How long ago?

A. I should say about three months ago Bella Marco and her husband came to my home on a Sunday, and I was home at the time and showed them around the ranch, and we sat outside at the pool and had a drink.

Q. Is that the only time she has ever been there?

A. Yes.

Q. Has this other girl you mentioned ever been out at your home? A. No.

Q. Were you in Van Nuys or Los Angeles on Sunday, April 11, 1943?

A. I believe that was a day that I was flying with the Civil Air Patrol at Quartzsite, Arizona.

Mr. Roth: You may cross examine.

Cross-Examination.

Q. By Mr. Cooper: Mr. Cummings, where does Mr. Smith work? A. Where does he work now?

Q. Where did he work in April or May or June of last year?

A. In April and May and June of last year—I believe at that time Jimmie had gotten a job working at Douglas [409] Aircraft factory at night, right around that period,

(Testimony of Robert Cummings)

because I wasn't working in pictures, and he felt that he should do something more important to the war effort than work for me.

Q. In November of this year he was working for you, was he not? A. This year?

Q. I mean 1943, when he made this affidavit and made this phone call for you.

A. No. As a matter of fact, he came out to the ranch quite often, because Jim has been more or less of a friend of mine for years, and we have eggs there, and he came out to the ranch there and sort of as a gesture of friendship he would bring his own car out, and sometimes he would take some eggs into town and sell them, and occasionally he would do something like driving my mother into town, because she has no transportation, but officially he was not working for me.

Q. On the occasions that he would come out there he would stay over night, would he not?

A. Sometimes, yes.

Q. And when you left was there anybody on the grounds other than your mother? Did your mother stay alone? A. You mean—

Q. When you went to Quartzsite, for example.

A. Sometimes my mother would stay alone. Sometimes she would bring a friend of hers out, who was also a minister, a [410] Mrs. McLaughlin, and she would stay with mother.

(Testimony of Robert Cummings)

Q. When Smith stayed there where did he stay?

A. He stayed in a little house on the ranch, an old house, where we called the caretaker's house, and there is a bedroom in there.

Q. Who took care of the cleaning at your place?

A. The cleaning?

Q. Yes, the necessary house work that had to be done.

A. That was done by my mother.

Q. Your mother would come over and clean your house?

A. If there was any necessity, yes.

Q. Your mother had a key to your place?

A. Yes.

Q. Did anybody else have a key to the place? Did Smith have a key to your place?

A. Yes.

Q. Who else had a key to your place?

A. That is all.

Q. Do you have a fence around your house?

A. Yes.

Mr. Cooper: That is all.

Mr. Roth: I have Mrs. Adeline Cummins in the courtroom this morning too, and I would like to recall her for just one question.

The Court: Yes. [411]

ADELINE CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff,
upon being recalled, testified as follows:

Direct Examination.

Q. By Mr. Roth: Testimony was given yesterday by a Western Union Employee, Mrs. Cummins, that on Sunday morning, April 11, 1943, she telephoned your house and asked who was at the other end of the line, and was told that it was Mrs. Oscar Cummins, and asked for Robert Cummings, and delivered a message to a Mrs. Oscar Cummins, on behalf of Robert Cummings. Does that statement by me of what the testimony was yesterday refresh your recollection any as to whether or not you received a message on Sunday morning, April 11, 1943, for Robert Cummings?

A. No, it doesn't. I am sure I didn't receive any such message.

Mr. Roth: You may cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all. That is all we have, your Honor, in the way of testimony.

The Court: May I inquire—counsel's recollection is likely to be more accurate than mine about this—was the telephone number State 52657 mentioned in the testimony given yesterday?

Mr. Cooper: I do not believe so, your Honor.

Mr. Roth: It was not, your Honor. There was a Sunset [412] number mentioned, but no State number was mentioned. There was a Sunset number and a Br num-

ber, and also a Crestview number that was called on Elm Drive, but there was no St number or State number on any of those papers.

Mr. Cooper: That is correct.

The Court: Now, with reference to the telephone numbers that were mentioned yesterday, do we have in the record anything to identify who resided at the house having the telephone with the preface "Sunset"?

Mr. Roth: I think the Sunset number—one of those numbers was the Universal number—I am not certain whether it was the Sunset number or not.

Mr. Erlich: Sunset. One of the Sunset numbers is Universal. The other Sunset number—I can tell you that number in just a moment by referring to the phone book.

Mr. Cooper: Can you determine the Universal number?

Mr. Erlich: Yes.

The Court: I am not interested so much in ascertaining the telephone number of defendant. Does the record identify who resided at the places bearing any of the other telephone numbers, besides the telephone number of Mr. Oscar Cummins?

Mr. Roth: I think it does, to this extent, your Honor. In respect of the Crestview number, the testimony shows that it was called and ascertained that Robert Cummings didn't live there and no one knew Robert Cummings that lived there. In respect of the Sunset number, the number which refers to [413] Universal, the testimony was that the number was called to get an address for Robert Cummings. In respect of the Brighton number that was called, it is stipulated that that was and is the telephone number of Oscar Cummins.

The Court: All that is clear to me. Now, with reference to any other numbers, have we any identification?

Mr. Roth: I don't think there were any other numbers. There may have been one other Sunset number.

Mr. Cooper: Yes, Sunset.

Mr. Roth: Bob Cummings, that is Sunset.

Mr. Joseph Cummins: 22636.

Mr. Erlich: The Universal number is Sunset 22171.

Mr. Cooper: It is my recollection, if your Honor please, that all of the numbers were identified in the record. Is that your recollection?

Mr. Roth: I thought so, Mr. Cooper.

The Court: Now will you repeat the telephone number of the plaintiff.

Mr. Cooper: Sunset 22636.

The Court: Very well, Let us proceed.

(Further argument by Mr. Roth.)

(Further argument by Mr. Cooper.)

The Court: Let me assure counsel that there is never any occasion to thank the Judge for participating in the trial of a case and doing his duty in the matter. I have enjoyed this trial, for reasons that I think are quite patent. [414] Both sides have been ably presented, and both sides have been represented by counsel who have been pre-eminently fair and candid, not only with the court, but with each other. Sometimes presiding at a trial is a sort of a punishment, but I do want to say to counsel that it is in the nature of a reward when the Judge is privileged to preside at a trial conducted by counsel with the thoroughness and the patience and the ability and fairness exhibited by both sides in this case.

I am not, of course, in a position to express final conclusions, either as to the law or the facts, at this particular moment. I just indicated that I desire to examine, among various portions of the evidence, the memoranda from which some of the witnesses testified. I think it is not out of place, however, to make a few observations.

As I said a moment or two ago, neither side contends that any one of the telegrams of April 10, 1943, was physically delivered, either to the plaintiff or to anyone purporting to represent him or anyone purporting to have any contact with him. And, having in mind the imperfections with which we are all handicapped, including inaccuracy of recollection, one can understand various differences between the testimony of some of the witnesses. I am persuaded that it is inherently improbable that whoever it was who listened to the reading of that rather lengthy telegram of April 10th, either wrote it down or recalled it exactly. I think the most [415] likely picture that can be given of that episode would be that the listener remembered the fact or the facts of Universal Pictures Corporation sending a wire requiring the services of Robert Cummings, and might also remember the date when he was to appear. Those matters might readily stand reasonably clear in the mind of the listener, who, some time thereafter, might repeat it.

I think it is equally clear that, because of matters which had transpired between the plaintiff, on the one hand, and the defendant, on the other, prior to April, 1943, there were strained relations between the plaintiff and at least one, if not more, of the executives of the defendant, and that that strained relationship existed as late as April, 1943, and, further, that Mr. Speers was given what might

be described as an unusual assignment, so far as dealing with the plaintiff was concerned. And I think, as defense counsel very frankly stated a few moments ago, that at least during the conversations between the plaintiff and Speers that antedated the sending of the telegrams of April 10th, it could not fairly be charged that the plaintiff was seeking to break the contract by, in effect, threatening that unless he got a new deal from the defendant he would give all of his time either to the Civil Air Patrol or to some other military service.

I think it is also fair to say that the plaintiff, so far as anything disclosed in the courtroom may be considered, [416] including his testimony, both direct and cross, has evidenced no feeling of either ill-will or of resentment or of anger against any of the defendant's executives. His manner, his attitude on the stand, his demeanor, as we call it, has impressed me as rather exceptional in that regard, and particularly because of the contrast which has been displayed by some of the witnesses on the stand. If my appraisal of these witnesses is sound, I cannot say that Speers was equally charitable, and, before reaching a conclusion as to how much credence to give to certain of the defendant's witnesses, as I have already indicated, I want to examine painstakingly the copies of the memoranda from which they testified.

Then, too, both when we come to weigh the facts, as well as determine the legal conclusions to be drawn therefrom, I am not yet clear as to the reasonableness of send-

ing a notice such as this telegram of April 10th after 6:00 P. M. on a Saturday night, requiring the appearance of the artist on the following Monday morning. As I say, that question comes to my mind, and it may have some bearing on just really what was the motive in sending the telegram, in view of that circumstance, having in mind that, at least by April 9th, the executives of the defendant who were concerned in the matter were aware of at least their own interpretation of plaintiff's position.

On the other hand, I expect to give serious consideration [417] to the point, among others, that defense counsel has emphasized today, that the requirement of the contract that plaintiff be available at all times in Los Angeles, unless excused in writing, and the circumstance that he was continuously absent from Los Angeles County during the period extending from at least May 19th to the evening of May 28th, constituted a breach on the plaintiff's part, and, even though the defendant were ignorant thereof at the time it refused to pay him compensation, that that breach constitutes sufficient legal justification for the omission to pay. Again it is not clear in my mind as to what bearing upon that contention is to be found in the circumstance that about April 12, 1943, the defendant took the position that plaintiff was suspended for the duration of the war.

I see that it is almost 11:00 o'clock, and we shall excuse counsel, particularly defense counsel. We will mark the matter submitted.

[Endorsed]: Filed Dec. 12, 1944. [418]

REPORTER'S TRANSCRIPT

Of Hearing Motion of Defendant for Order of Dismissal as to 1st and 2nd Causes of Action and Judgment on the Pleadings as to the 4th Cause of Action, Pursuant to Notice Filed 5/10/44.

Los Angeles, California, Monday, May 29, 1944, 10:00 A. M.

The Clerk: No. 3242, Robert Cummings vs. Universal Pictures Company.

The Court: The calendar shows that we have noticed for this morning, in the case of Cummings vs. Universal Pictures Company, two motions on behalf of the defendant; one for an order of dismissal as to the two counts on which the case proceeded to trial; the other is a motion for judgment on the pleadings with respect to the fourth and remaining count.

Mr. Lewinson: May I proceed, your Honor?

The Court: Yes.

Mr. Lewinson: May it please the court, as your Honor has indicated the case is before the court on two motions made by the defendant; the first is to dismiss the two causes of action that have been litigated, and the second is for a judgment on the pleadings on the cause of action which has not been litigated, that being the fourth cause of action; the two causes of action that have been litigated being the first and second causes of action. The third cause of action was voluntarily dismissed at the trial.

The basis of the motion to dismiss is that neither count states a cause of action, and the reason why neither count

states a cause of action is that there is no allegation in the pleadings, in either count, that the plaintiff has [2] performed the conditions of the contract which were to be performed by him, or there are no allegations showing that he was excused from performing the conditions which were to be performed by him. The basis of the motion for judgment on the pleadings is slightly different, but substantially the same. The fourth count, while in terms alleging—that is to say, in general terms by way of conclusion—that the plaintiff has performed all conditions to be performed by him, shows by its affirmative allegations that those conditions were not performed. In that behalf, the fourth count shows that the plaintiff was under the duty to perform in pictures which were assigned to him. That is shown by the contract itself which is annexed as an exhibit to the complaint. Then is set forth certain conversations between the plaintiff and an officer of the defendant when the plaintiff was called upon to perform in the picture called "Fired Wife," and the gist of that conversation was that plaintiff said he wouldn't perform in a picture of that kind; and these officers said he was right. They didn't say according to the pleadings he had a legal right to do it or that his contract permitted him to take that position, but they said he was right in the stand that he wouldn't have to do it. They then changed their minds and insisted on the contract.

The cases cited show that an oral agreement which is not executed cannot modify a writing. I am not going to [3] supplement the memorandum on file on that point, because the point is not contested, as I understand, in the memorandum filed by the plaintiff, and it can't very well be contested. I will call your Honor's attention to the facts which your Honor has doubtless already noted, that the

motion is made not on the pleadings, but on the evidence in the case. It is rather fortunate that the motion was so made, because the attempts to meet the motion here are based upon the evidence in the case. And that was contemplated, of course, at the time the motion was made. It was also contemplated that properly an application might be made to amend; and under the federal practice a motion for dismissal could not be granted if an amendment can properly be allowed. The evidence shows, I think, and I will comment on that briefly in a moment, that no such amendment could be made, and, indeed, there is no application for the amendment.

It is interesting to note, your Honor, that there is no attempt to meet either motion, and I will confine myself to the motion to dismiss, because the other motion isn't contested. There are the usual facts and circumstances covered by the memoranda on file. There is no attempt to meet the motion to dismiss on the merits, and there couldn't very well be, because an examination of the pleadings shows an absolute absence of allegations that the defendant performed or that he was excused from performing.

The Court: You mean the plaintiff? [4]

Mr. Lewinson: The plaintiff. I should say. Now, how does the plaintiff undertake to meet the motion to dismiss? In the first place, he asserts the case is no longer on trial, or in effect asserts that, and, therefore, that the motion is not in time. It is true that under the new rules of practice in the federal courts that a motion to dismiss because the complaint fails to state a cause of action must be made during the trial, otherwise the motion is waived. There isn't any doubt about that. In that respect it might

be stated, although it is hardly necessary to comment upon it, that the federal rules inaugurate a vastly different system of pleadings than has hitherto prevailed in our English-American courts, but we take the rules as we find them. The only question is, is the case still on trial? There isn't any doubt about that. It is necessary to cite cases on that point, if your Honor please, because they are not cited in our memorandum. And in order to save the time of the court I hand the court a memorandum of the cases that will be cited, and hand them to counsel. That will save the time of taking notes, as well as the time of argument. May I do that, your Honor?

The Court: Yes.

Mr. Lewinson: There are two cases cited on the point to which I now call your Honor's attention. The first one, a decision of the United States Circuit Court of Appeals, [5] in which the opinion is by Judge Sanborn of the Eighth Circuit—the late Judge Walter Sanborn—and the opinion cites numerous cases to the proposition which is quoted in the memorandum which I have just handed the court, namely, “The trial ends only when the finding is filed, but if no finding is filed before, when the judgment is rendered.” The emphasis is on the word “only.” There having been no finding yet filed by the court, the case is still in the bosom of the court; the case is on trial and the motion is timely.

The next effort to meet the motion is made in various phraseology, but it all comes to this: It is claimed that because of the answer filed and because of the evidence taken at the trial, that the point is waived. We have cited a number of cases showing that those points are not well taken. In the first place, the rule is as indicated in the

memorandum, that a defective complaint may be aided only where the answer affirmatively alleges the very fact that is missing from the complaint to make it sufficient. Of course, there is no allegation in the answer that the plaintiff performed or was excused from performing; nothing of the sort. Then it is also held that a finding may be made on evidence introduced without objection where the pleading is defective in form, but not where the evidence "is outside of any issue presented in the pleading." The cases on that are cited to the court. [6]

Without going into detail on those points, because they are simple points of proceeding and it is unnecessary to elaborate them, I am going to present the case very briefly, your Honor, on a hypothesis which is much more favorable to the plaintiff than the authorities, and that is on the hypothesis that it may be contended on their part, as it has been contended not only in this memorandum filed responsive to the motion, but also in the memorandum filed responsive to our objections to the pleadings, that the evidence fails to show a repudiation on the part of the plaintiff, although efforts are made in that behalf. Your Honor will recall—I assume you have read the memorandum that we filed in support of the objections to the findings?

The Court: Not in its entirety; no.

Mr. Lewinson: Well, your Honor will read that, and there is no point in taking the time of the court in open court to canvass the things that are covered in detail there and which are much more easily assimilated with the eye than by the ear, at least by counsel arguing the case. But there are two points which are undertaken to be made; one in the first memorandum filed, that is, the memorandum filed in response to our objections, and the supporting authorities; and the other in this later memorandum. The

first point that is made is that reading the record as a whole the evidence does not show that the plaintiff repudiated the contract. Nothing is said in support of that assertion. [7] That is a bald assertion. I have read the record as a whole, and I have read it in detail. Your Honor has a copy of the full transcript, do you?

The Court: Not on the bench here.

Mr. Lewinson: But you have it available?

The Court: Yes.

Mr. Roth: Do you want to use mine?

Mr. Lewinson: I am going to refer to it. It is referred to in the memorandum or the brief, and I am not going to take the time of the court to go into matters of detail of that sort, but I want to say this to the court: That the question of repudiation arises from several conversations had between the officers of the defendant and the plaintiff here, Robert Cummings, and his agent, Oscar Cummins. I will refer to them as Robert and Oscar, if I may take that liberty, in order to avoid confusion, because of the similarity of names. I have set forth in the memorandum all the evidence which appears on that conversation or those conversations which came from the lips of Robert and Oscar. I have omitted the evidence that came from the lips of the officers of the defendant, and I have assumed, following the suggestion that your Honor made in his memorandum, that the evidence of the defendants was to be rejected. Assuming that for the purpose of this argument. The evidence of the officers of the defendant—I will say the defendant—and the evidence of the [8] officers of the plaintiff—the plaintiff and his agent—come to the same thing. It is a case, if I may repeat a quotation from the old Georgia decision in another case I

referred to once, or perhaps more than once, a case that the driver was drunk but the carriage reached home. As far as the law is concerned, the evidence comes to the same conclusion. The result of that is this: While the plaintiff and defendant gave somewhat different versions of the various conversations, on either version the plaintiff declined to go on with his contract. At best, the version of plaintiff and his agent as to what occurred is this: The plaintiff was called upon to play the part of "Hank" in "Fired Wife." He said he wouldn't do it. He refused flatly to do it. There is no dispute about that. There is no dispute but that was a breach on his part. In other words, he was obligated to do it. Without going into the effect of the breach, which I will refer to presently, Robert and Oscar went further. They said the plaintiff would not perform in any similar pictures and he wouldn't perform in any pictures that were merely for the purpose of commercial success or making money by the defendant, and he wouldn't perform in any pictures unless they were in the interest of the war effort, and he wouldn't perform in any pictures unless he could select the associate actors and unless he could select the director and approve them. That is the gist of the testimony of Robert and Oscar, and [9] there isn't any question about it. Nowhere in the record have they said anything that was inconsistent with that, and nowhere in the record did the witnesses for the defendant say anything that was repugnant to that. The version of the conversation on the part of the officers of the defendant was that Robert and Oscar refused to go ahead, but they refused to go ahead because Robert said he was going into the Civil Air Patrol in the government service and was going to devote his entire time to the war effort. That was the reason. I am by no means con-

vinced, from a thorough examination of the record, which isn't now being argued, that the version of the conversation given by the defendant is not the true version. But be that as it may, the whole question is not what Oscar said and not what Robert said, in detail, but did they say something which indicated that Robert would not go on with his contract? That is the proposition before the court, and nothing has been suggested in the memorandum responsive to our memorandum which is in any way inconsistent with the evidence or qualifies the evidence which we have set forth. So I submit it to your Honor on the examination of the record, and I have set forth the relative facts and have confined myself to the uncontradicted evidence, because on the objections to the findings or on this motion I didn't care to go into the weight of the evidence. That is too big a job, and that is properly the office of a motion for a new [10] trial and not a proceeding of this kind. The only point that the plaintiff made in his first memorandum, after this point had been raised and the evidence had been set forth, was that if you read the record as a whole, and we have done so—I remember arguing a case in the Circuit Court of Appeals some years ago, when Judge Rudkin was senior judge, and I undertook to review the pleadings. It was a case which Judge James had dismissed with prejudice on the ground that the cause of action wasn't stated by the pleadings, and I suggested that the best way to construe a pleading was to read it. And Judge Rudkin said, the only way to construe it was to read it. But I don't think the whole burden of the record should be imposed on the court, unless counsel can show that we haven't consistently set forth the contents. Unless counsel can do that I think your Honor should accept our digest of the record. If your Honor wishes to re-read this testi-

mony we welcome that labor on your Honor's part. That is the status of the record, so far as the first brief is concerned. In the second brief—

The Court: Before you leave the first proposition, do I understand the contention that has just been discussed is that the only reasonable inference that may be drawn from the testimony of the plaintiff, and the other evidence offered in his behalf, is that he declined to make any pictures, except that they would conform to certain conditions? [11]

Mr. Lewinson: Except conditions that he had no right to impose.

The Court: Yes.

Mr. Lewinson: That brings me to the very next point that counsel has undertaken to make in their second brief—

The Court: Before you go into that second proposition, is it your position that plaintiff did not in substance and effect advise the defendant that if, as to this particular picture "Fired Wife," the director were changed, that he would not go on, even though he took exception to certain of the cast and even though he thought the script was, as one witness called it, "crap"?

Mr. Lewinson: He called it that himself, your Honor. I think, from a preview of the evidence, my answer should be, "no." I want to state frankly, however, if you take Oscar Cummins' testimony alone, the answer might conceivably be, "yes." In other words, on the later conferences that Oscar Cummins had he testified in effect, and that is set forth in my brief, that under no circumstances would they work under that director. That was out of the question. That's all he said at that time. If you were to assume that's all that was said at any time, and left that

out of its context and disregarded the testimony of Robert and the other testimony of Oscar, then you could say that that was the only condition that he imposed; but if you read the evidence as a whole, which I have set forth, you would have [12] to say that he imposed three or four or half a dozen additional conditions. But even if he imposed only one condition that he had no right to impose, it comes to the same thing.

The Court: As to that one picture, it is admitted that there was a breach.

Mr. Lewinson: Of course, but he said he wouldn't perform in any pictures like it; I have quoted that, your Honor; or any pictures of that character; and he uses various phrases which project his attitude toward "Fired Wife" into the future and applies that to other pictures of that character. Now, if it was a breach not to play "Fired Wife," and he said he wouldn't under any circumstances play any other picture of that kind, that was a repudiation. That is my point.

And, your Honor, may I say this: I could understand, if I may say so, how the evidence, of the character which is set forth in detail, alluded the court, and perhaps counsel in the case, too, when it was delivered from the witness stand, because it was given as a sort of rambling story about what occurred, and it may very well be that the witness' voice dropped when he answered to a particular thing. But be that as it may, when you read it in the cold record there isn't any doubt about it. He said in varying forms that he not only would not produce that picture, but he would not produce any other picture. I am going to say [13] this, while we are on that point—I was going to take it up separately, but I can just as well take it up now—In our memorandum in opposition to the findings we

cite a California authority which is expressly to the effect that a man who has first breached a contract may not later undertake to terminate it or to bring an action because of a subsequent breach on the part of the other party. There is no attempt whatever in either of these two briefs lately filed to meet that point, and that point is decisive and without repudiation.

Coming back to the repudiation, your Honor, I can read from the brief, but I think again your Honor will get that better from the reading than you would from my reading of it. If you would care to have me read it—

The Court: No. I am merely interrupting to make certain that I am following the discussion.

Mr. Lewinson: Your Honor, I am trying to convince you; I am already convinced myself; and I welcome interruptions. Now, your Honor, as I said, I am presenting this matter now on their contention of waiver; in other words, that they proved a cause of action even though they didn't allege it and it nowhere appearing in the pleadings. I have shown that the evidence is as I have indicated; that they haven't made any effort to meet it; they have just tried to meet it by forgetting it, where possible. They apparently realized that when they came to file their second [14] brief, because they raised a point which isn't responsive to anything said in our memorandum, but I am glad they did raise the point, because it makes it possible for me to make the thing much more explicit than it was made before. I took it for granted, as I think any lawyer who has been through the law of repudiation—and I have been through it a half a dozen times in other cases—that the language used by Oscar and Robert constitutes a repudiation, because it undertook to impose conditions that they

had no right to impose. I didn't cite authority on that subject, because it seemed obvious. Counsel comes back and they attempt to meet it by cases, which they cite, in which it is said in very general language that in order to be a repudiation the refusal to go ahead must be unequivocal. There isn't any doubt about that. They seem to think it answers the point. We submit it doesn't answer the point, because the cases very explicitly hold that the refusal to go ahead, except on conditions which aren't in the contract, constitutes a repudiation and is an unequivocal expression not to go ahead. The California cases are very clear on that, and our code is clear on it. Under our Point 4, in this little memorandum which I have handed to your Honor this morning, we cite four California cases, and the code section, if I may use the inelegant expression, is right on the nose on that proposition. And an examination of the cases, where I have given the page reference and where the discussion occurs, [15] supports our position. In the very latest case on the point the matter is phrased somewhat differently by our California Supreme Court, and our Supreme Court cites one of the cases which I have referred to already and which phrased it the way I have phrased it; and also, our Supreme Court in that case quotes or paraphrases the Restatement of the Law. I have given the citation, but I will give your Honor the quotation. It doesn't appear in quotes, but it should appear in quotes. I am quite sure. It appears in the advance sheets. *Gold Min. & Water Co. v. Swinerton*—it is on the second page of this memorandum—23 A. C. 19, 29, in which the court said: "A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive

statement to the promisee indicating that he will not or cannot substantially perform his contractual duties.”

They have gotten away from that old and inartificial way of saying, “Unequivocally repudiates it,” because that doesn’t mean anything. That is a statement which, I think, is lifted bodily from the Restatement, although credit isn’t given in the opinion for it. But the other cases, which are cited under Point 4, use the language I have used, explicitly, that where a person offers to perform on conditions he refuses to perform altogether and he is guilty of a breach. [16]

There is another suggestion that I would like to make to the court, and that is based in part on a case which isn’t cited in the memorandum handed to your Honor this morning, and if your Honor cares to look at it it is Great Lakes—

The Court: On this fourth point?

Mr. Lewinson: No; it isn’t the fourth point. It is a point which stems from the fourth point, but it is slightly different. It is Great Lakes Dredge & Dock Company v. Huffman, 319 U. S. 293; 87 Lawyers Edition, 1407; decided in 1943.

The Court: May I have the page in 319 U. S.?

Mr. Lewinson: Yes. 293, your Honor. That is a decision in which the opinion is written by Chief Justice Stone, and it holds that a declaratory relief action is, for all substantial purposes, a suit in equity and that the equitable doctrines which stand in the way of recovery obtain in a declaratory relief action. Now, I suggest, your Honor, that it appears from the evidence here that the plaintiff has been guilty of unclean hands and, therefore, in no event could he recover in a declaratory relief

action or be permitted to stultify himself by amending his pleading, should he ask to do that. And my point about the matter is this, and, as I say, it stems from the fourth point, and the cases which deal with the point are found in our second memorandum; that is to say, the memorandum filed [17] in support of this particular motion here, which is entitled, "Further Memorandum in Support of Motion to Dismiss and for Judgment on the Pleadings," and I refer to the fourth point there, pages 4 to 7. It is said that that point is not in the memorandum which counsel filed and is not in any way referable to the situation here. I think it is not only on the matter of repudiation generally, but also on the matter of unclean hands. And may I call attention to a bit of evidence in the case? Your Honor will probably recall it. We have this sequence: We have Robert Cummings first breaching the contract by refusing to play the part of "Hank" in "Fired Wife"; then we have him repudiating by giving notice that he won't play in any similar pictures or in any plays, except on conditions that he has no right to impose. And we have no withdrawal of that repudiation at that time. Now, something was said about that at the trial, but this feature of it was not emphasized, and the cases which I have cited and the code section which I have cited were not brought to the court's attention. Here is the evidence that I would like to offer, following the sequence that I have indicated: We had "Hank" performed by another actor; and, of course, they have indicated that the defendant was put to a great inconvenience, because it wasn't until after it had the plaintiff lined up for the playing of "Hank" that the plaintiff refused unequivocally to go ahead and, therefore, there were delays that must have [18] entailed expense. We have that further situation; then what do we have? We have

Oscar having an appointment with Mr. Muhl, the secretary of Universal in charge of the contract department, and he says nothing whatever about withdrawing that repudiation or being willing to come back to work. He avoids any discussion of Robert Cummings and his affairs with Muhl. Then that very afternoon he goes around to what you might call a mechanical employee, an employee without discretion, a paymaster, to do what? To make a demand. Of course, he wasn't bound to make a demand if he wasn't in default, but apparently he thought he was, so he went around to find out whether the money was available, and he found out it wasn't available. Why? Not because Universal had excused Cummings from the contract or accepted his repudiation or had itself refused to go ahead, but because he was under suspension by reason of his repudiation. All right. Then Oscar Cummins apparently goes back to his office and he sends a chauffeur around, in what I would term a sneaky sort of way—and I use the term “sneaky” conditionally; not sneaky to make a demand, but to make the inquiry because he said he believed all the time the money would be there; and the chauffeur made an inquiry and got the same answer. Then Oscar Cummins had his secretary call up and somebody listened over the telephone and took the conversation down, and she made the same inquiry. Why did not Oscar Cummins discuss the matter with [19] Muhl, if your Honor please? He knew Muhl would have said, as the notice indicated, “All you have to do is to have Bob report for duty and tell us he is willing to go on, and his check will be available.” Now, that is unclean hands, but whether it is unclean hands or not, under the law of repudiation, as set forth in our Civil Code and as set forth in a very comprehensive opinion in the United States District Court

of Appeals for the Seventh Circuit, which is quoted from in this second brief of ours beginning at page 5, the failure on the part of Robert Cummings to retract his repudiation made it impossible for him to terminate the contract or to get any relief. That is what the authorities hold.

Now, your Honor, I could take more time and I could go into matters which are discussed in the brief that I first filed, that is to say, the brief in support of the objections to the findings, but it isn't necessary to elaborate those things. My purpose here has been merely to draw the briefs together, to attempt to state the points clearly and to cite authorities which are in response to any points made by plaintiff in plaintiff's second brief. Of course, there is a multiplicity of briefs here which may lead to a confusion of counts, rather than a clarification of it. But our position in the matter is this, your Honor: The complaint obviously does not state a cause of action in either the first or second counts, because of the failure of [20] material allegations, the allegations of performance or excusable performance. No effort has been made to meet that, except to claim that the motion is not in time; and I have shown that it is in time, because the case is still in the bosom of the court and is still on trial. The only other effort to meet it has been to invoke procedural points in giving them all the better of it. That certainly can't discredit the motion, if their evidence shows the same omission and the same defects that the complaint shows. The only point they have attempted to make is that using general language, that the conduct and the notice that Oscar gave was not unequivocal. Well, as Justice Holmes, in an oft-quoted metaphor said, "General propositions do not decide concrete cases," and we have referred to the concrete cases that show that an attempt to impose conditions

which are not in the contract, such as a notice by a contracting party that he will not go ahead, except upon conditions which he does not have a right to impose, constitutes a repudiation. In addition to that, we have the point, which hasn't even been hinted at by counsel in any brief that they have filed, since the point was made by me and not previously made by Mr. Cooper in the trial, that the plaintiff was the first party to breach the contract, and having breached the contract and also repudiated it, and not retracted it, he can't come into a court, particularly a court of equity, and ask for relief [21] that will terminate a contract.

Now your Honor, admittedly I have extended myself in an endeavor to bring this matter appropriately before the court, because the case is one of extraordinary importance. It is important as far as the relations of Robert Cummings are concerned. It appears by reasonable inference from the facts, from the terms of the contract and the option, that Robert Cummings was an untried man when Universal took him on; that he developed and became a star. He may not have been a star of the first water; I am not competent to testify to that; but at any rate he was sufficiently a star that officers of the defendant offered to settle the case by suggesting that they call a picture contract, which is the kind of a contract that the biggest stars get. Now, after having built up Robert Cummings, after having spent doubtless hundreds and thousands of dollars, and maybe more in the development of him, it is not right that he should be permitted to come in and repudiate his contract. The sanctity of a contract means something; it should mean something to him; but the case is more important than that, because not only Universal, but the whole picture industry is based upon

these contracts, because they can't operate without these contracts of personal service. If these stars or people who are developing into stars are permitted to repudiate contracts under these conditions, and those repudiations are sanctioned by the courts, there can't be any [22] discipline in the relationship of master and servant and the picture industry can't function. That may seem like an argument of convenience, and in a sense it is. Of course, I am not suggesting that your Honor determine the case on anything except the law and the evidence, but it is, I think, proper for me to advert to the tremendous importance of the case, not only in this personal relationship, but to the defendant in the operation of its business. They operated for 25 years without Cummings, and while they are entitled to Cummings' service on the contract that they have, they probably could get along without him. But the case is more than that. They can't function if, on this sort of evidence, an actor can breach and repudiate a contract and then terminate it. And I make that point with all the earnestness I can, because I know that your Honor gave this case very careful and very laborious consideration and study. I wouldn't ask a court to go over a case and consider points that hadn't been previously stressed, although they stand out in the record, but I think it is only fair to the court and fair to the parties that these points be made with all the earnestness that I have. I hope your Honor will go into these briefs, as I know you will, and give the matter the consideration that it merits, for the reason that I would like to bring to your Honor's attention now, if you haven't read the briefs in full, and the reason is stated by Sir Frederick Pollock in an article in the Encyclopedia [23] Britannica on "Contract." I might say I read that article 30 years ago. I have been waiting 30 years to in-

sert it in a brief and this is the first opportunity I have had, and I think it is just "pat." That is the reason I have inserted it.

"Enforcement of good faith in matters of bargain and promise is among the most important functions of legal justice. It might not be too much to say that, next after keeping the peace and securing property against violence and fraud so that business may be possible, it is the most important."

I thank your Honor for your careful consideration and I submit the matter on the briefs on file, on the record before the court, and on the argument now made to your Honor.

Mr. Roth: May it please the court, I don't know whether Mr. Lewinson's reference to his oft-reiterated quotation from the Georgia case is made with calculation, that is, that the driver was drunk but the carriage reached home, but in view of his outstanding criticism of the pleadings in this case and the evidence, and what has been thus far the decision of the court, and his self-confessed conclusion that he is very much impressed with the soundness of his criticism and his position, I find myself in the position of a man who feels perfectly well, but as he walks along the street all his friends tell him he doesn't look so well and he begins to wonder whether or not he is sick. I refuse to [24] believe I am sick just because Mr. Lewinson says so. Mr. Lewinson has sort of brushed off his motion for judgment on the pleadings as addressed to the fourth cause of action, and while doing so says that the plaintiff hasn't paid much attention to it and sort of concedes it. Well, of course, we don't concede anything of the kind. We do concede that the principle upon which it

is apparently predicated, that is, that a written contract can't be modified by parol unless the parol is executed, is a sound principle, but we are not aware that our fourth cause of action is based upon any attempt to modify a written contract. Our fourth cause of action is based upon the proposition that the contract can't give Universal any greater rights than the right to reasonably require Robert Cummings to perform certain services. The contract itself in certain parts of it says so in so many words, and there is good law to that effect. In other words, if a man is an adult leading person, Universal, we contend, couldn't insist that he play the role of a juvenile, and if he is a tragedian of standing and Universal planned for him the role of a comic, we insist Universal couldn't enforce him to play the role of a comic. Furthermore, a motion for judgment on the pleadings is nothing more than a general demurrer. And the court will recall that our fourth cause of action, which has by reference made the entire first cause of action a part of the fourth cause of action, then goes on to allege a construction [25] of the contract and the fact that the officials of Universal agreed with Robert Cummings on what was a proper construction of the contract, and when he told them that it wasn't proper for them to require him to play a certain role in the picture "Fired Wife" with a certain director and with a certain cast, that he was within his rights, that is, his contractual rights, and when they told him that since he was within his contractual rights and they would furnish a certain kind of director and a certain kind of cast, that he was ready to perform.

Now, further, on that fourth cause of action this court has spent a great deal of time, and so have counsel. Counsel have been in this court on at least three separate occasions, going to great pains to settle the issues in this

case. The first occasion was when the plaintiff made a motion for summary judgment; the defendant countered with a motion for injunction. At that time we had an extended discussion, the contract was analyzed in detail by the court, was argued and discussed by counsel, and it was practically agreed in open court at that time there was one default being complained of, that is, that the plaintiff refused to play the role of "Hank" in "Fired Wife." A few weeks later the defendant came into court and made a motion to amend its pleadings. At that time there was an extended discussion as to what the issues in this case were and the issues were more or less fixed. The court made certain observa- [26] tions in respect of proposing amendments. At that time one amendment was permitted to be filed by stipulation, to-wit, the amendment which said something about the telegram of April 10th and which brought in another defense, that is, that the plaintiff was being required to do something other than perform the role of "Hank" in "Fired Wife," that he was also being required to perform other services on or about April 10th or April 12th, whichever the date happened to be. And at that time the permissibility of filing a second amendment was argued and discussed, and that second amendment was this plea of estoppel, that is, that plaintiff had stated to the defendant, or its servants or officers, that he was going to engage in flying and was going to join the Civil Air Patrol for the duration of the war. That amendment was permitted and was filed later; so we had another issue in the case.

Then at the time of trial the court, at the outset of the trial, stated what the issues were, counsel agreed with the court, and the court made some remark to the effect that it was clear to this court that counsel were getting at the

heart of the case. The case went to trial. During the period of trial some other issues were evolved; one about unavailability; another one about the fact that the defendant was lulled into a sense of security, which was a sort of offshoot of that issue of estoppel. And the court will also remember that at the outset of the trial it was stated, and [27] this specifically with respect to the fourth cause of action, by myself, I think, and Mr. Cooper agreeing, that we had had certain conversations prior to the time of trial to the effect that we would not try the fourth cause of action—the third having already been dismissed—because if the case were decided for the plaintiff upon the first cause of action it would be decisive of the entire litigation. Therefore, the fourth cause of action was held in abeyance, and that is the status now. Until this judgment is signed and until it is filed, this fourth cause of action is in abeyance. If, for any reason, this judgment is not sustained or if no judgment is entered, we feel we are in a position to go ahead to try our fourth cause of action. The fourth cause of action is one on what this contract means and what the rights of the plaintiff are in respect to it.

Now, in the fourth cause of action there is an allegation—it is true there isn't in the first cause of action—but in the fourth cause of action there is an allegation to the effect that plaintiff performed all the things he was required to do and perform under the contract. And we also have a stipulation of facts, and that stipulation says in effect that all the matters which are admitted in the fourth cause of action shall be deemed to be admitted for the purposes of all causes of action. There is no specific denial of that allegation in the fourth cause of action. [28] So for all practical purposes the effect is that the first

cause of action is cured by stipulation, if it needs any curing. We went to trial on certain settled issues, and if I may be permitted to use the expression, the guts of the entire argument of the defendant now, as set forth in its objections to the findings, as set forth in its motion to dismiss and as set forth in its motion for judgment on the pleadings, is crystallized in a finding which it requests the court to make. It asks the court to amend its findings by adding a new finding to this effect: That the plaintiff, at the time he was asked to play the role of "Hank" in "Fired Wife," then and there stated that he would not perform any of his obligations under such contract and that he then and there or thereby repudiated the contract. That, I think, is the substance of the language. Of course, that is not the testimony. It isn't even an inference from the testimony which the defendant excerpted in its memorandum in support of its objections to the findings. Robert Speers was on the witness stand and testified for some 48 pages of reporter's transcript. Ed Muhl testified at great length. But the only person who had any outstanding conversation with Robert Cummings, was Robert Speers, in respect of how Robert Cummings looked upon this contract. And the record shows that their first conversation was of approximately three hours in duration. During that three-hour conversation they spoke [29] of many things, but principally about the contract. That three-hour conversation was followed by a telephone conversation in which Robert Cummings and Robert Speers extended their remarks. Now, I challenge Mr. Lewinson, I challenge any impersonal party to read the record—

Mr. Lewinson: You mean impartial party, don't you?

Mr. Roth: Pardon?

Mr. Lewinson: You mean impartial party, don't you? I don't want to be compared to an impersonal party.

Mr. Roth: I wasn't comparing you. I think the phrase "impersonal party" is satisfactory, but I will accept your remark and make it impersonal and impartial, if that is in accord. But if the testimony of Robert Speers is analyzed impersonally there is nothing in that testimony which could sustain an inference that Robert Cummings at any time said that he wasn't going to perform the contract or that he was through with the contract. All Robert Cummings ever said, all Speers ever said he ever said, was that he wasn't going to perform the role of "Hank" in that picture. Throughout the whole testimony of Robert Speers the reference is to a certain picture, to-wit, the picture "Fired Wife."

Now, we admit that we didn't play that role, and when we refused to play it it is true the defendant had certain rights. Now, if it had no contract such as is in evidence here as a part of the complaint, it would have, as a matter of law, the right to say, "It is an anticipatory [30] breach. We can rescind or we can sue for damages," or it could have waited for the actual breach and said, "We have our remedies. We can rescind or we can sue for damages." But the defendant has had a lot of experience in this business and it had a great deal of contact with actors and other personnel engaged in the motion picture business, and they weren't satisfied with the rights or the remedies which the law gave them. They wanted something in addition to that. They wanted to supplement their legal rights, and being advised by counsel of experience they evolved a form of contract in which form they gave themselves these additional rights, namely, they don't have to terminate and they don't have to sue for damages;

they can go on with the contract: they can make certain elections under the contract. And in this particular case they elected to go on with the contract. They elected to suspend the plaintiff, that is, to suspend his compensation, and thereafter to extend the term of the contract for the duration of the suspension. So the contract was actually in full force and effect from the time Robert Cummings and Robert Speers first had their conversation with respect to Cummings playing the part of "Hank" in the picture "Fired Wife" to the day of the breach by Cummings and on the day of the breach and after the day of the breach, all the way on through until May 29th, when Robert Cummings took upon himself to terminate the contract, because the defendant had refused to pay him his compensation. [31]

Now, Mr. Lewinson would have the plaintiff come in and retract his repudiation. How could he retract his repudiation? The contract itself provides that he couldn't. If he had come in the next day, the defendant would have told him that it didn't need his services; that he couldn't put himself back on the payroll in that manner. That was the whole purpose of this particular suspension and extension. When once he was suspended they did not want Mr. Robert Cummings to come back the next day and say, "I am now ready to do the work," because meanwhile they had selected a substitute to do the particular job, and they didn't want Mr. Robert Cummings to have the right to put himself back on the payroll.

Now, there was certainly no repudiation in the fact that Robert Cummings said, or is alleged to have said by Mr. Speers, that he was going to join the Civil Air Patrol for the duration of the war. The record shows that the defendant never accepted that statement as a repudiation or even as a breach. As a matter of fact, they plead in

the second amendment to their answer that they would have respected and did respect his desire to enter the armed forces of his country and they would have assisted him in getting any sort of position or opportunity to serve his country.

So Universal never looked upon that statement as any sort of breach of his obligations. As a matter of fact, [32] the court will undoubtedly recall the testimony to the effect that Mr. Speers and Mr. Cummings had a conversation on the subject of whether or not it was Robert Cummings' duty to do something because the country was at war. There was some conversation about the Hollywood Victory Committee, and Speers was attempting to convince Robert Cummings that his activities in the Hollywood Victory Committee and his activities with the Civil Air Patrol were sufficient, and that he was performing a real service when he played a part in pictures.

We respectfully submit that counsel can't try this case in a vacuum. He just can't sit off and analyze a group of pleadings and say that the first cause of action doesn't say that this man offered to perform, when the issues in that particular case have already been settled, when the witnesses have been heard and when there is nothing, as a matter of fact, to allege. The only things in the contract that we could make any allegation about are about the negative covenants. There is a clause in the contract, a paragraph in the contract we call the morals clause, which is to the effect that the party must so conduct himself that his conduct is not offensive to public morals. It is true we might have alleged a negative compliance with this covenant, and we didn't. On the other hand, defendant's answer sets forth that we were in default. The issue was tried. Evidence was had upon the subject.

And in [33] spite of Mr. Lewinson's statement to the effect that we can't now stultify ourselves by asking for an amendment, which is more of a hope than a fact—we could, but I don't feel that there is any need to even ask for an amendment to conform to the proof in this case, because the proof shows that from about the 12th day of April up until the 29th of May no demand of any kind, written or oral, was made upon Robert Cummings in this case by the defendant. The court will recall that it went to great pains and made a thorough analysis of this contract at the very first hearing, and that analysis was supplemented as the trial went on; and the court came to the conclusion and asserted that it was a contract which required the plaintiff to do nothing except respond to the requests and follow the notices of the defendant. No such notice was given. That is very clear from the evidence.

Counsel has made what he says is a very sincere plea, in his opening remarks, to the effect that this is a very important case because it involves the sanctity of contracts. We have no desire to violate that principle in any respect. We agree that the sanctity of contracts should be upheld and that no relations in commercial life can be had unless contracts are enforced. This contract was made and written by the defendant. It has thousands of words in it, so as to protect the rights of the defendant. The only right the plaintiff has under the whole contract is his right [34] to collect compensation. And we agree that that contract should be enforced. The defendant didn't pay that compensation; it made all the moves here;

and it elected to give the plaintiff in the case a very clear opportunity to terminate his relations with them. We respectfully submit that the findings of the court as recommended in its memorandum decision are borne out in every respect by the record here, that they should be followed, that the findings of fact and judgment should be signed and the motions denied.

Mr. Lewinson: I have only a very few words to say in reply. Counsel has laid stress on the motion for judgment on the pleadings. Your Honor will find, upon reading the fourth cause of action, that an effort is made to modify the contract by an unexecuted patrol agreement, that that's all there is to it. There is no use of me stressing that, because that arises from an examination of the pleadings and from an examination of the authorities which we have cited, which are conceded by counsel.

One other observation: Counsel wants to know how Mr. Cummings could retract his repudiation. That isn't the position counsel took in the trial. At the trial of the case counsel took the position that Mr. Cummings didn't have to retract his repudiation; he didn't have to go with his hat in his hand and tell the people at Universal that he was ready to go back to work; on the contrary, they had to seek [35] him.

Mr. Roth: That is still my position.

Mr. Lewinson: That may still be your position, but that isn't the way you stated it in your argument. You asked, "How could he retract his repudiation?" You said, "If he had retracted his repudiation Universal would

have told him they didn't want him to go back to work." The evidence doesn't bear that out, your Honor. In the first place, there was no retraction, so there is no evidence that Universal would not take him back. But, on the contrary, there is substantial evidence in the form of two writings, which were the notices of suspension, that Robert Cummings was suspended until he reported for work. That is almost the identical language. So counsel is definitely repudiated on that by the record. It not only was possible for Robert Cummings to retract, it was his duty to retract. I see nothing else in the argument of counsel which calls for comment, your Honor, and I submit the matter.

The Court: I am trying to find a reference to one of the statements made, I believe, during the argument at the close of the evidence.

Mr. Lewinson: I don't know that there were any concessions by counsel who presented the matter to the court—I refer to counsel for defendant—which are inconsistent with any position I have taken, but inasmuch as the case is still on trial, if there are any inconsistencies in the [36] statements then made, I think they are not binding upon the defendant, and if they are, we would ask to be relieved from them.

The Court: Just let me have your indulgence a moment.

Mr. Lewinson: Certainly, your Honor.

The Court: Yes. I am looking now at page 44 of the court's memorandum.

Mr. Lewinson: May we locate it, your Honor, in our file?

The Court: Yes.

Mr. Lewinson: The page again, your Honor?

The Court: 44.

Mr. Lewinson: Yes, your Honor.

The Court: What is probably line 11: "In the course of the oral argument at the close of the trial defense counsel stated: 'Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said he was going into the Civil Air Patrol, or the army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is Bob Speers and Bob Cummings, agreed on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that [37] respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt that it was his duty to give one hundred per cent of his time to war work and therefore was signing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important issue in the case because everything flows from that conversation of April

5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window.' "

My idea in calling attention to this is to ask counsel now arguing the motions as to what meaning you make of that statement.

Mr. Lewinson: That last sentence, I think, is ill-advised, to say the least, and should be withdrawn, and is hereby withdrawn.

The Court: You don't think it was a sound statement on the evidence and on the law?

Mr. Lewinson: Certainly not, your Honor. No; it certainly wasn't.

The Court: To make my point clear, I recognize that counsel should not, as it were, be foreclosed from asserting what is the law or what is the final conclusion to be drawn [38] from the evidence, but what I had in mind in calling this to the attention of counsel this morning is that it purports to state a position—

Mr. Lewinson: Well, the position is not well taken. It concedes too much, and I can see where it very well might have misled the court. The rest of the statement, if I may put it in this cold and not too complimentary way, isn't half bad. It isn't too accurate, but the fact is, your Honor, as I indicated in my opening argument, Bob Speers and Muhl, and the memoranda that they offered in support of their position, did stress the matter of the Civil Air Patrol. That is a thing that stuck out in their minds. I emphasized that this morning. There is a good deal in

the testimony of Robert Cummings which explains that, because he said over and over again that he was going into the Civil Air Patrol and he said, also, that he couldn't play "Hank" for that reason. He put a sort of saving clause on the matter. But the point of the matter is this: The whole question here is on a different phase of the case. Did Robert Cummings in effect give notice that he wasn't going on with the contract according to its terms? Whether it took the form of a statement that he was going into the Civil Air Patrol or the form that he didn't like the director and wouldn't play under that director, or he didn't like his associates or didn't like money-making pictures, or various other reasons, is immaterial. The ultimate fact is, [39] did he renounce and repudiate the contract? I think his own evidence and the evidence of his agent, disregarding entirely the version of the conversation given by Speers and Muhl, shows that he did repudiate the contract.

I am glad your Honor brought this matter up, because I think it was impliedly withdrawn by the position that I took; now it is expressly withdrawn.

The Court: I think I should have the benefit of the transcript of your argument.

Mr. Lewinson: We are delighted to furnish it to your Honor.

The Court: Very well. The motions will be marked submitted.

[Endorsed]: Filed Dec. 15, 1944. [40]

[Endorsed]: No. 10954. United States Circuit Court of Appeals for the Ninth Circuit. Universal Pictures Company, Inc., a corporation, Appellant, vs. Robert Cummings, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 22, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

Appeal No. 10954

(Civil Action No. 3242-H. District Court, Southern
District of California, Central Division.)

Universal Pictures Company, Inc., a Corporation,
Defendant and Appellant,

vs.

Robert Cummings,

Plaintiff and Appellee.

APPELLANT'S STATEMENT OF POINTS ON APPEAL.

In accordance with Rule 75(d) of the Rules of Civil Procedure, appellant, Universal Pictures Company, Inc., hereby makes its statement of points on which it intends to rely on appeal, as follows:

1. The Court clearly erred in denying appellant's motion to dismiss appellee's complaint, as well as in denying appellant's motion for judgment on the pleadings.

2. Appellee's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or entitle him to relief.

3. Appellee failed to plead or prove that he had performed, or was ready, or willing, or able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, and failed to plead or prove that he had any valid excuse for nonperformance.

4. It appeared by the clear weight of the evidence that prior to the alleged breach of the contract by appel-

lant, appellee had breached the contract and appellee was in default under the terms of the contract at the time of bringing the action, and had not at any time cured said default.

5. Appellee failed to prove that appellant's breach, if any, was a material breach of the contract; and it appeared from the clear weight of the evidence that appellant's breach, if any, was an immaterial breach and the equities were in appellant's favor.

6. It appeared from the clear weight of the evidence that appellee, prior to the alleged breach of contract by appellant, had repudiated the contract, and had never retracted such repudiation.

7. The findings, as well as the judgment, are clearly erroneous in that:

(a) The Court clearly erred in denying appellant's motion to dismiss appellee's complaint, as well as in denying appellant's motion for judgment on the pleadings.

(b) Appellee's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or entitle him to relief.

(c) Appellee failed to plead or prove that he had performed, or was ready, willing, or able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, and failed to plead or prove that he had any valid excuse for nonperformance.

(d) It appeared from the clear weight of the evidence that appellee had committed the first breach of the contract, and that prior to the bringing of the action appellee was in default under the terms of said contract, and had not at any time cured said default.

(e) Appellee failed to prove that appellant's breach, if any, was a material breach of the contract; and it appeared from the clear weight of the evidence that appellant's breach, if any, was an immaterial breach and the equities were in appellant's favor.

(f) It appeared from the clear weight of the evidence that appellee, prior to the alleged breach of the contract by appellant, had repudiated the contract, and had never retracted such repudiation.

(g) The termination of the contract referred to in appellee's complaint is against the clear weight of the evidence.

(h) The clear weight of the evidence shows that appellant did not breach, or threaten to breach, any of the promises or conditions to be performed by it under the contract.

(i) The clear weight of the evidence shows that appellee had not performed, nor was ready, nor was willing, nor was able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, nor had any valid excuse for non-performance.

(j) The clear weight of the evidence shows that appellant did not waive any of its rights under said contract.

8. The Court's Findings of Fact are insufficient to support the judgment.

9. The Court's judgment is contrary to law.

10. The Court clearly erred in denying appellant's motion for a new trial.

Dated December 19, 1944.

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Service acknowledged December 19, 1944.

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[Endorsed]: Filed Dec. 22, 1944. Paul P. O'Brien,
Clerk.